Office-Supreme Court, U.S.
FILED
MAR 10 1964
JOHN F. DAVIS, CLERK

No. 901

IN THE

Supreme Court of the United States

October Term, 1963

JOHN REINER & COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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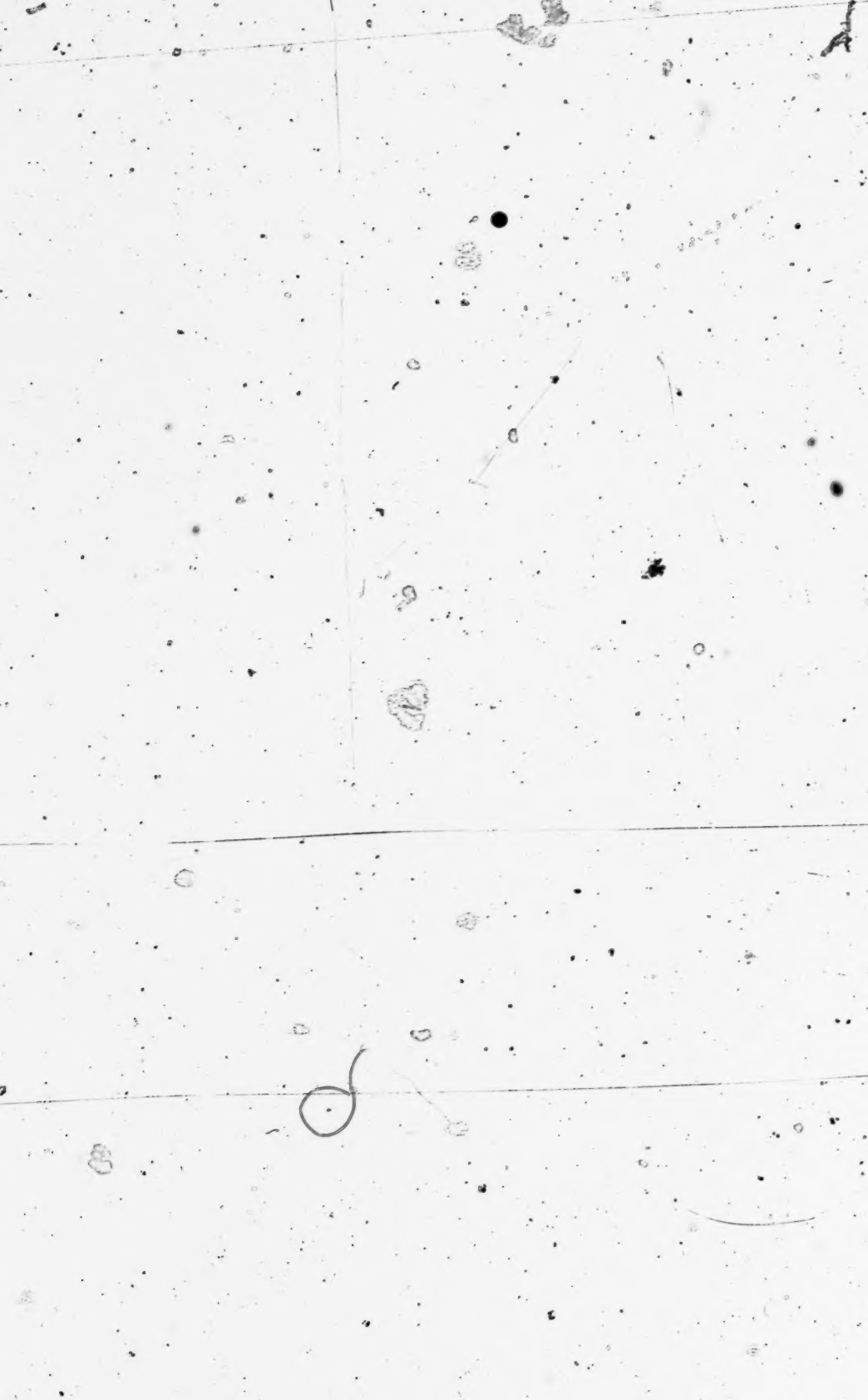

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims.

Opinions Below

The opinion, concurring opinion and dissenting opinion of the Court of Claims (App., *infra*, pp. 1a, 14a, 15a) are reported at 325 F. 2d 438, 445, 446.

Jurisdiction

The judgment of the Court of Claims was entered on December 13, 1963 (App., *infra*, p. 48a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1255.

Question Presented

Whether the wrongful cancellation of a contract by the United States gives rise to normal damages for breach of contract or whether recovery is restricted to the costs

payable under a standard termination-for-convenience clause contained in the contract but not invoked by the contracting officer.

Statutes and Regulations Involved

Sections 407.302, 407.304 and 407.707 of the Armed Services Procurement Regulations (Federal Register, February 29, 1952) are involved. They are set forth in Finding 13 of the Findings of Fact of the Court of Claims (App., *infra*, pp. 33a-40a).

Statement

In June 1956, after competitive bidding, petitioner entered into a contract with the United States Army Corps of Engineers for the manufacture of 3,567 generator sets at a fixed price of $3,716,814 (App., *infra*, pp. 16a, 17a, 26a, 27a). Some six weeks after performance of the contract had commenced, petitioner was ordered to suspend operations (*Id.* pp. 27a, 28a). On September 21, 1956, the contracting officer cancelled the contract (*Id.* p. 33a). Cancellation was based on an opinion of the Comptroller General that the invitation to bid, upon which the contract was awarded, was ambiguous and that the contract consequently was illegal and void (*Id.* pp. 28a-33a).

The contract contained a termination-for-convenience clause authorizing an administrative determination by the contracting officer that termination of the contract was in the best interests of the Government (*Id.* pp. 18a-26a). The opening sub-paragraph of this standard clause read as follows:

> "(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting officer shall determine that such termination is in the best interests of the Government. Any such termination

> shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective."

The clause also prescribed the procedure to be followed in the event of such termination and defined the costs to which the contractor would be entitled.

In cancelling the contract, this clause was not invoked by the contracting officer. The administrative determination specified in the clause was never made. The prescribed procedures were not followed.

At the time of the cancellation the Armed Services Procurement Regulations contained specific regulations governing terminations for convenience of the Government (App., *infra*, pp. 33a-40a). Among other things, the regulations required that the notice of termination specifically state that "the contract is being terminated for the convenience of the Government under the provisions of the termination for convenience clause * * *" (§ 407.304); they also required the contracting officer to send to the contractor a set of standard forms for the submission of a settlement proposal of its termination claims and to request the contractor to settle the termination claims of its subcontractors and suppliers (§ 407.707-2). Petitioner did not receive a telegram or letter from the contracting officer stating that the prime contract was terminated for the convenience of the Government pursuant to the termination-for-convenience clause. The contracting officer did not send to petitioner a set of standard forms for the submission of the settlement proposal of its termination claims, nor did the contracting officer request petitioner to settle the termination claims of its subcontractors and suppliers.

At the time of the suspension of the contract, the requisitioning agency had not withdrawn the requisition for the generator sets. The record shows that the generator sets

were needed and that the procurement officials were not satisfied with the opinion of the Comptroller General (App., *infra*, pp. 27a-28a).

It is questionable whether, in view of the need for the generator sets, the contracting officer could in good faith have invoked the termination-for-convenience clause. In any event, if he had invoked the clause he would necessarily have acknowledged that petitioner and its subcontractors had claims for termination costs. This would have been incompatible with the Comptroller General's opinion that the contract was a nullity. In conformity with the Comptroller General's views, the contracting officer cancelled the contract for its alleged invalidity, thereby preserving for defendant the contention that petitioner was not entitled to any recovery whatever.

After advising defendant that the wrongful cancellation was considered a breach of contract (App., *infra*, pp. 40a-41a), the petitioner instituted and tried this action in the Court of Claims.

The Court of Claims was unanimous in deciding that the requirements of the Armed Services Procurement Act of 1947 [41 U. S. C. § 152 (1952 ed.)] had not been violated by the invitation to bid and that the contract was lawful and binding (App., *infra*, pp. 3a-7a). The judges divided on the question whether the petitioner was entitled to the damages flowing from breach of contract. A majority ruled that the existence in the contract of a termination-for-convenience clause, even though not invoked by the contracting officer, fixed the limit of possible recovery and precluded recovery of damages for breach of contract (App., *infra*, pp. 7a-12a). The dissenting opinion points out that the contracting officer cancelled the contract for illegality for the express purpose of avoiding any liability on the part of the Government; a termination for convenience, if available in the circumstances, would have rendered defendant liable for termination costs (App., *infra*, pp. 14a-15a). It turned out

that there was no illegality. Adhering to other rulings of the Court of Claims in comparable situations, the dissenting opinion takes the view that when the Government deliberately cancels a contract for a reason it can not sustain, it cannot escape the normal consequences of its wrongful breach merely because the contract contains a termination clause which the Government, equally deliberately, chose not to utilize.

Performance of the $3,700,000 contract would have constituted petitioner's principal manufacturing activity for more than a year (App., *infra*, p. 26a). The judgment entered below denies to petitioner the substantial damages it naturally suffered as a result of the wrongful cancellation and restricts its recovery to a meagre $17,000 (App., *infra*, pp. 41a, 48a).

Reasons for Granting the Writ

The case presents important questions as to the meaning and effect of termination-for-convenience clauses in government contracts. The clauses owe their origin to war and post-war emergencies. Termination clauses were inserted in some war contracts late in World War I.[1] They emerged again during World War II.[2] They continue to be included in most military procurement contracts.[3] Although former-

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[1] La Brum, *Termination of War Contracts for the Government's Convenience*, 18 Temple U. Law Quarterly 1, 8 (1943); Gromine & Edwards, *Terminations After World War I*, 10 Law & Contemporary Problems 563, 567-569 (1944); Edwards, *Cancellation of War Contracts: Plans & Practice 1918-1919* (Bureau of Labor Statistics, 1943) 5.

[2] Mainman, *Policies and Procedures for the Termination of War Contracts*, 10 Law & Contemporary Problems 449, 452-459, 509-517 (1944); Goldman, *Termination of War Department Contracts At the Option of the Government*, 42 Mich. L. Review 733, 740-746, 761-770, 780-786 (1944).

[3] See Armed Services Procurement Regulations, 32 Code of Federal Regulations, chap. 1, sub-chap. A, § 8.701 *et seq.*

ly the clauses differed widely in wording and content, today they are fairly uniform.[4]

The judges of the Court of Claims, however, are sharply divided as to the consequences to be attributed to termination-for-convenience clauses. The disagreement arises, not when the contracting officer terminates the contract upon a finding that termination is in the best interests of the Government, but when he terminates or cancels the contract for another reason, which the contractor calls into question. If it is found that the defendant is wrong and the contractor right, the judges are split as to when the contractor may recover damages for breach of contract and when he is restricted to termination costs. On the same day on which the opinions in this action were filed, a sharp division among the judges was also revealed in two other cases posing the same problem.[5] In *Goldwasser* v. *United States*, 325 F. 2d 722, the majority opinion is written by the dissenting judge in this case and two of the judges comprising the majority here are the dissenters.[6] In the other case, *Brown & Son Electric Company* v. *United States*, 325 F. 2d 446, the division among the judges is the same as in this case.[7]

Prior to these decisions, *Klein* v. *United States*, 285 F. 2d 778, was believed to have settled the question in the

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[4] See *supra* notes 2 and 3.

[5] For convenience the opinions are printed in Appendix B, *infra*, pp. 49a-73a.

[6] In *Goldwasser* the majority opinion (App., *infra*, pp. 49a-55a) is written by Judge Whitaker, who is joined by Judges Laramore and Durfee. The dissenters are Chief Judge Jones (App., *infra* pp. 56a-63a) and Judge Davis (App., *infra*, pp. 64a-65a).

[7] In *Brown*, the majority consists of Chief Judge Jones and Judges Laramore, Durfee and Davis. The dissent is by Judge Whitaker, App., *infra*, pp. 66a-73a.

Court of Claims. In that case there was also a dissent.[8] It now appears that the present members of the Court of Claims are in basic disagreement as to the holding in *Klein* and whether its reasoning is to be followed in other cases (See *infra*, pp. 8, 10).

The disagreement in the Court of Claims has introduced uncertainty into a vital area of government contracts. The disagreement and uncertainty can only be resolved by this Court. The problems are recurrent, are of importance both to the Government and to contractors, and are worthy of full review by this Court.

1. In *Klein*, the contracting officer had terminated a contract for default. The contractor appealed the administrative determination to the Armed Services Board of Contract Appeals. Following a ruling by the Board that the contractor was not in default, the contracting officer gave a new notice stating that the earlier notice was to be deemed a termination of the convenience of the Government. The contractor sued in the Court of Claims for breach of contract. A majority of the court below held that the purported termination for convenience was not effective and that the contractor was entitled to breach-of-contract damages rather than termination costs. Writing for the majority, Judge Madden said (285 F. 2d at 784-5):

> "Our conclusion is that the Government, having wrongfully terminated [the] contract, could not retroactively give that wrongful termination a different legal effect by changing the label which had been expressly and purposely attached to it when the termination occurred. The only purpose of the change of label was to diminish the amount of the damages which [the contractor] might recover. That kind of saving is not what the contract contemplated in its words 'in the best interests of the Government.'"

[8] In *Klein*, the majority consisted of Judges Madden, Durfee and Laramore. Chief Judge Jones dissented. Judge Whitaker took no part in the consideration and decision of *Klein*. 285 F. 2d 778, 787.

The factual differences between *Klein* and the instant case do not warrant a different result. In the present case, the contract was wrongfully cancelled for alleged illegality rather than for default. Here, the contracting officer did not terminate for convenience either initially or at any subsequent time; indeed no other Government official has ever taken action pursuant to the termination-for-convenience clause. On the contrary, defendant continued to urge throughout the trial and argument below that the contract was illegal and that petitioner was not entitled to any recovery (App., *infra*, pp. 3a-7a). Thus, the factual differences would appear to present even stronger reasons than existed in *Klein* for rejecting the argument that the contractor should be restricted to termination costs.

The majority below, however, announces that it will not follow *Klein* unless the facts are identical, *i.e.*, the contract is terminated for default and the Government later relies upon a termination-for-convenience because it can not prove a default. Judge Davis states (App., *infra*, p. 10a):

> "Some of the foregoing may seem incompatible with certain observations in *Klein* v. *United States*, 152 Ct. Cl. 8, 16-20, 285 F. 2d 778, 782-85 (1961). That case dealt with an erroneous termination for default which the defendant later sought to turn into a convenience termination. The only *holding* of the court (on this point) is that, once the Government wrongfully terminates for default where there has been no default, it cannot thereafter seek to avoid liability by invoking a convenience termination. That holding the court accepts and reaffirms today in *Goldwasser* v. *United States*, Ct. Cl., No. 477-61. Although some portions of the *Klein* opinion may seem to go beyond that holding if taken out of context, we how read the case as confined to the issue of default presented by its facts. * * *"[9]

[9] However, Judge Davis and Chief Judge Jones dissent in *Goldwasser* on the ground that *Goldwasser* is also distinguishable from *Klein*. See App., *infra*, pp. 62a, 64a-65a.

What remains unanswered in the majority opinion is why the following proposition is not equally tenable:

> Once the Government wrongfully terminates for illegality where there has been no illegality, it cannot thereafter seek to avoid liability by invoking a convenience termination.

In our view, the same result must follow whether the wrongful termination is for alleged default, alleged illegality or any other insupportable reason. Termination costs are payable only when the contracting officer has in good faith made an administrative determination that termination is in the best interests of the Government and has otherwise complied with the contractual provisions as to termination-for-convenience. We submit that the dissenting judge is correct when he declares that the allowance of damages for breach of contract in the instant case would be "* * * in harmony with our holding in *Klein* v. *United States* * * *" App., *infra*, p. 15a.

2. The majority opinion in this case is also out of harmony with *Goldwasser;* decided the same day. In *Goldwasser,* the defendant, dissatisfied with the contractor's performance, because of a so-called "indefinite-quantities" clause, terminated the contract on the ground that it was under no obligation to continue the contract. It was found that the agreement was a "requirements" contract, not an "indefinite-quantities" contract. A majority of the judges ruled in *Goldwasser* that, since defendant had not invoked the termination-for-convenience clause in stopping performance, the contractor would not be restricted to termination costs (App., *infra*, pp. 53a-55a). The dissenters took the position that this made no difference and that the mere existence of the termination-for-convenience clause restricted the recoverable damages to termination costs (App., *infra*, pp. 56a-65a).

We perceive no factual differences between *Goldwasser* and the instant case to justify completely opposite results.

Judge Laramore, who concurred with the majority in both cases, views *Goldwasser* as a termination for default (App., *infra*, p. 14a), presumably governed by *Klein*. But Judge Davis, who wrote the majority opinion here and one of the dissenting opinions in *Goldwasser*, states in *Goldwasser*: "* * * This was not a termination for default and the rule of the Klein case is inapplicable * * *" (App., *infra*, p. 64a). We think Judge Whitaker has analyzed the situation correctly when he states in his dissent in this case (App., *infra*, p. 14a):

> "Having written the opinion of the court in *Goldwasser* v. *United States*, Ct. Cl. No. 477-61, this day decided, it follows that I disagree with the opinion in this case. It reiterates, I think, the positions taken in the dissenting opinions in the *Goldwasser* case".

The crucial fact common to all of the cases under consideration is that the contracting officer deliberately chose to terminate or cancel the contract on a ground which, if sound, would have relieved the Government of all liability. If he had terminated for convenience he would have automatically rendered the Government liable for termination costs. Since the course deliberately followed by the contracting officer was not justified, the real question is whether the mere existence in the contract of a termination-for-convenience clause somehow limits the contractor's recovery to termination costs. If it does—and we believe it does not—then all distinctions based on the particular reason assigned for termination or cancellation disappear. It should make no difference whether the termination is for alleged default (as in *Klein*), for alleged illegality (as in this case and in *Brown*), or because the contracting officer did not think the defendant was further obligated (as in *Goldwasser*). It would mean that, whatever the reason for defendant's non-performance or repudiation, normal damages for breach of contract would no longer be available to contractors. The limitation of termination costs would

always preclude a larger recovery. In brief, the Government would never be liable for breach of contract, only for termination costs.

Contractors are entitled to know whether a contractual provision, permitting termination-for-convenience when the contracting officer determines that it is required in the interests of the Government, is to have such far-reaching consequences. This case presents the opportunity for a careful consideration of the problem and a meaningful decision to guide the Government and its contractors.

3. Reliance is placed by the majority below on *College Point Boat Corp.* v. *United States*, 267 U. S. 12. In that case, which arose during World War I, the contract with the Navy was made shortly before the signing of the Armistice. There was no contractual provision permitting the Government to terminate for any reason. The Navy informed the contractor that the articles to be manufactured probably would not be needed, suggested suspension of the contract and asked the contractor to submit a proposition for cancellation of the contract (267 U. S. at 14). Extensive negotiations looking toward settlement of the contractor's claim were inconclusive and suit was instituted in the Court of Claims for breach of contract (*Id.*).

Neither party knew prior to suit that the Emergency Shipping Act (Act of June 15, 1917, 40 Stat. 182, C. 29) was applicable to the contract. That Act authorized the Government, through exercise of the power of eminent domain, to requisition contracts between private parties and to suspend, cancel and modify its own contracts upon payment of just compensation. Upon learning of the statute, the Government's right to cancel was asserted in the Court of Claims. This Court construed the power conferred by the statute as an "unconditional right to cancel" and a "continuing right of cancellation" which was not lost because it had not been exercised before suit (267 U. S. at 16). Since the contract had been properly can-

celled under the statute, the Court allowed the contractor just or full compensation.[10]

In *College Point* there was no attempt to cancel the contract for a reason which defendant could not support. The defendant was not conscious of two alternate courses, one which would not render the defendant liable and another which would subject it to liability. It did not deliberately choose one course over the other. Nor did it attempt to switch when it found that one route was not available. Defendant suspended the contract to avoid useless production. Its pre-suit efforts to settle were fruitless. Then it discovered that the contract could be cancelled through the power of eminent domain, and it asserted the right. Its course was consistent throughout, as the Court pointed out (267 U. S. at 16):

> "* * * Ignorance of its right doubtless prevented the Navy Department from taking, shortly after the Armistice, the course which would have resulted legally in cancelling the contract at that time. But the right to cancel was not lost by mere delay in exercising it; among other reasons, because the statute conferred upon the Government also the power to suspend the contract. * * *"

The right to terminate under a contractual convenience clause is vastly different. It is not an unconditional right.

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[10] There is no question that the destruction of contract rights through the power of eminent domain does not result in a breach of contract. In *De Laval Steam Turbine Co.* v. *United States*, 284 U. S. 61, 70-71, also involving the 1917 Emergency Shipping Act, the Court said:

> "* * * [T]he cardinal point to be borne in mind is that whether the contract requisitioned or cancelled be one with the government or one between private individuals, the person whose property rights are taken or destroyed is entitled to receive just compensation, not damages as for a breach. A sufficient ground for the distinction lies in the fact that in the one case the requisition or cancellation is a lawful act under the power of eminent domain, while in the other the act constituting the breach is unlawful."

Its exercise requires an administrative determination that termination is in the best interests of the Government (App., *infra*, p. 18a). It can not be exercised in bad faith, arbitrarily, capriciously or in circumstances constituting an abuse of discretion. When exercised it sets in motion a series of administrative procedures in the course of which the contractor has express rights to administrative reviews (App., *infra*, pp. 18a-26a). It is not a continuing right which survives a previous termination or cancellation for another reason.

In *Klein*, the court below ruled that *College Point* was not controlling (285 F. 2d at 783, 784):

> "In the case before us, the Government had no such right to cancel the contract as it had under the 1917 statute. Its rights to terminate for default, or for the convenience of the Government, were expressly defined in the contract * * *.
>
> "When one makes a contract with the Government, he of course takes the risk that the provisions of the contract, worked out by the Government in its long experience in the writing and administration of contracts, may work to his disadvantage. But he does not, merely by signing a contract with the Government, award it a license to twist and warp one of the exculpatory provisions which it has written into the contract, and make it apply to a situation not covered by the provision as written. If the Government desires to do what the 1917 shipbuilding statute did, i.e., reserve the unqualified right to cancel contracts, and agree to pay just compensation for their cancellation, let it say so, as it did in 1917. In the instant case it did not reserve such a right to cancel, and, by the law of contracts, it had, in the circumstances, no more right to cancel than does any party to any contract."[11]

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[11] Yet in the present case, although the termination-for-convenience clause is identical with that in *Klein*, the majority below states flatly: "* * * The broad termination clause in plaintiff's contract stands in the place of the statutory termination power involved in *College Point Boat Corp.* * * *" (App., *infra*, p. 10a).

The majority in the court below also emphasizes the following sentences in the *College Point* opinion (App., *infra*, p. 9a):

> "• • • A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for non-performance by him, although he was then ignorant of the fact.[1] He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.[2] • • • " (267 U. S. at 15-16; omitting cases cited in footnotes)

This is a familiar legal principle, but it has no applicability to this case or to the problem under consideration, as the cases cited in *College Point* show. The principle is that a defendant may avail himself of a breach of the contract *by the plaintiff* even if the defendant did not know of the breach when he stopped performance. Here there has been no breach by the plaintiff; the only breach is by defendant. Moreover, there was no ignorance by defendant (as in *College Point*) of the action it could take. The existence of the termination-for-convenience clause was well known to the contracting officer. Nevertheless he took another course. As pointed out in the dissenting opinion below (App., *infra*, p. 15a):

> "• • • It is contradiction to say that [defendant] terminated a contract that in law it asserted had never existed. Whether it had a right to do so or not is immaterial, because it did not in fact do so. The possession of a right means nothing unless that right is exercised.
>
> "• • • [A] cancellation of the contract because it had been illegally entered into involved no liability on the part of the Government; a termination for convenience did render the Government liable. The Contracting Officer chose the former course. The Government is bound by the action he took."

In a case in which the contracting officer first terminated the contract for convenience and then sought to terminate for default a few days later, the court below was unanimous in holding that defendant was bound by the first action. See *Line Construction Co.* v. *United States*, 109 Ct. Cl. 154, 181. Chief Judge Jones, writing for the court, said (at 190, 191):

> "* * * It seems clearly an election of the courses to be pursued and a subsequent change of mind and an effort to change the course of procedure * * *."
>
> * * *
>
> "* * * There is no basis either in law or in equity for permitting defendant to escape the consequences of the action that was taken."

4. To reach the conclusion that the termination-for-convenience clause controls the damages in this case the majority below does violence to the purpose and content of the clause. The clause is not to be used at the whim of the contracting officer. "The privilege of termination at the convenience of the Government," said the late Robert P. Patterson, then Under Secretary of War, "is an extraordinary one, justified solely by the necessity for flexibility in the procurement of war materials so that varying military requirements may be met."[12] In *Davis Sewing Mach. Co.* v. *United States*, 60 Ct. Cl. 201, aff'd 273 U. S. 324, cited in the majority opinion below as authority that the standard clause in today's contracts may be terminated "at will," the termination clause was expressly restricted by its terms to use "* * * in the event of termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the Chief of Ordinance should be of the opinion that the completion of this contract has become

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[12] From letter, dated October 8, 1943, to Andrew J. May, Chairman, Military Affairs Committee, House of Representatives, quoted in LaBrum, *Termination of War Contracts for the Government's Convenience*, 18 Temple U. Law Quarterly 1 (1943).

unnecessary * * *." 60 Ct. Cl. at 203. And it was the cessation of World War I hostilities that caused suspension of the contract. *Id.* at 207, 214. In *Librach* v. *United States*, 147 Ct. Cl. 605, cited for the same purpose, the contracting officer specifically invoked the termination clause because the requisitioning agency, in the honest belief that the articles were no longer needed, had canceled the procurement directive. 147 Ct. Cl. at 613, 620-622. These are hardly "at will" terminations.

We think it plain that defendant in writing the standard termination clause, and contractors in accepting the clause, have agreed to accord to the Government flexibility in modern-day procurements.[13] They did not contract that defendant could use the clause as a cover for its wrongful actions. They did not contract to wipe out the well-settled principles that (1) when the Government enters into a contract it incurs the responsibilities which a private person assumes [*Lynch* v. *United States*, 292 U. S. 571, 579; *Perry* v. *United States*, 294 U. S. 330, 352], and (2) if the Government terminates or cancels a contract without justification it is liable for all damages flowing from the wrongful act [*United States* v. *Behan*, 110 U. S. 338, 346; *United States* v. *Spearin*, 248 U. S. 132, 138]. The court below recently reaffirmed these principles in *G. L. Christian & Associates* v. *United States*, 312 F. 2d 418, 423, even though it read a termination-for-convenience clause into the contract.

Certainly there is no warrant for assuming that the convenience clause was designed to embrace a situation in which the contract is claimed to be illegal, as no contractual authority is needed to set aside illegal contracts. Indeed, the two are completely inconsistent. If the contract is void, no use can be made of its contractual provisions. Also, it would be contrary to the public interest to allow

[13] In the present case, the record shows that the requisition for the generator sets had not been withdrawn by the requisitioning agency and the sets were needed by the Government. (App., *infra*, pp. 27a-28a).

defendant to award termination costs despite a contract's illegality. The majority opinion below recognizes that "[i]f the Comptroller General's view was that the contract was void, termination would itself be inappropriate since the whole contract would be a nullity" (App., *infra*, p. 8a). It suggests, however, that termination "* * * would cushion a possible clash with the General Accounting Office." *Ibid.* Apart from the speculation inherent in the suggestion, we see no basis for attributing to the contracting parties a purpose to fashion the termination-for-convenience clause as a device for soothing quarrels between Governmental departments.

The conditions of termination clauses have been strictly applied. In *Burton Coal Co.* v. *United States*, 60 Ct. Cl. 294, aff'd; *United States* v. *Burton Coal Co.*, 273 U. S. 337, it was provided that the contract might be terminated by a 15-day notice if in the opinion of the Quartermaster General "the public interest shall so require" (60 Ct. Cl. at 301). Damages for breach of contract were awarded to the contractor because the cancellation of the contract was not based on the required opinion of the Quartermaster General. Time and again, in other contexts, the court below has held that where the contract calls for the decision of a particular official of the Government, the contractor is entitled to the uninfluenced judgment of that official; the judgment of his superior or a third person can not be substituted. See *Williams Engineering & Contracting Co.* v. *United States*, 55 Ct. Cl. 349, 383; *King* v. *United States*, 37 Ct. Cl. 428, 436; *Sun Shipbuilding & Dry Dock Co.* v. *United States*, 76 Ct. Cls. 154, 187. In the present case, the termination clause called for the independent judgment by the contracting officer that termination was in the best interests of the Government. The contracting officer never made that administrative determination, to which petitioner was entitled, and never set in motion the administrative procedures which follow such a determination and which are designed to safeguard the interests of contractors.

The majority below goes farther than merely exempting defendant from the usual requirement that the express conditions of the termination clause be met. It penalizes petitioner because it can *not* show that someone in authority would not have eventually whispered in the ear of the contracting officer that the way to end performance legally is to invoke the termination-for-convenience clause. This unique and impossible burden is expressed as follows (App., *infra*, p. 12a):

> "* * * A standard termination clause was ever-ready for use and it is more than likely that this contracting officer (who thought the award to plaintiff valid) would have acted explicitly under that provision to end performance legally as soon as someone be [sic] deemed authoritative had whispered in his ear that he was breaching the agreement by cancelling it in the way he did. Since plaintiff cannot show that that would not have happened, it must fail in its quest for prospective profits * * *."

It is in this connection that the majority opinion below refers to the concurring opinion in *United States* v. *Penn Mfg. Co.*, 337 U. S. 198, 214-216. In that case, an award had been made but before the contract had been reduced to formal terms, it was cancelled by the Navy. In an action for damages flowing from breach of contract, it was held by a majority of this Court that the plaintiff must fail because it had not been found that it was ready, willing and able to manufacture the articles.[14] The concurring opinion points out that at the time it was Navy policy to include termination-for-convenience clauses "in most contracts" and that plaintiff had not carried the burden of showing that its contract, when written, would not have included such a clause (337 U. S. at 214-216). The specific

[14] In the present case, it was found that petitioner desired to continue performance and had the physical facilities, personnel, the financing and the knowledge to complete the contract (App., *infra*, p. 41a, Finding 16).

terms of the termination clause were not before the Court and it is apparent the concurring Justices assumed that the clause would have conferred on defendant an unconditional right to terminate.

In the evolution of termination-for-convenience clauses their terms and conditions have varied. On occasion they were made exercisable at will, as in *Line Construction Co.* v. *United States*, 109 Ct. Cl. 154.[15] But the standard clause currently used, as we have shown above (*supra*, pp. 12-13), is not unconditional. There is no need in this case to make assumptions as to its terms; the specific conditions of the clause are in the record. Thus, this case, unlike *Penn Mfg. Co.*, permits a definitive decision as to the impact of the standard clause on recoverable damages when the contract is wrongfully cancelled, terminated, or otherwise breached by defendant.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES REMBAR,
GEORGE ZOLOTAR,
Counsel for Petitioner,
521 Fifth Avenue,
New York 17, New York.

March 1964.

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[15] The termination clause in *Line Construction Co.* read in part as follows (109 Ct. Cl. at 174):

> "The Government may terminate this contract in whole or in part at any time by a notice in writing from the Contracting Officer to the Contractor, specifying the date upon which such termination shall become effective and the extent to which the performance of such contract shall be terminated.* * *"

APPENDIX A

IN THE

UNITED STATES COURT OF CLAIMS

No. 431-57

(Decided December 13, 1963)

JOHN REINER & COMPANY, INDIVIDUALLY AND TO THE USE OF KURZ & ROOT COMPANY (INCORPORATED) v. THE UNITED STATES

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

OPINION

DAVIS, *Judge*, delivered the opinion of the court:

In May 1956 the Corps of Engineers advertised for bids on 3,567 generator sets to be purchased by the Army. The invitation stated that "the Government desires delivery" of the items in accordance with a definite schedule (ranging from September 30, 1956, to August 31, 1957), but it was also provided that "in the event bidder is unable to make deliveries in accordance with the foregoing schedule, he shall set forth in the space below his proposed delivery schedule." Immediately beneath this blank space for the bidder's own delivery schedule, the form declared:

> Bids offering a proposed delivery schedule which will extend the time for the delivery of the quantities as called for in any delivery period of the foregoing delivery schedule by more than 60 days, *may* be cause for rejection of bid [emphasis added].

Plaintiff, John Reiner & Company, submitted a bid with

days after those listed by the Government in the invitation. When the bids were opened on June 21, 1956, Reiner was the lowest in price of the thirteen bidders. Seven others proposed their own delivery schedules, some (like Reiner) offering delivery dates more than 60 days beyond the invitation times. The Corp of Engineers then inquired of the requisitioning agency (the Signal Corps) whether plaintiff's schedule was satisfactory and met its requirements. Upon receiving an affirmative reply, the Engineers notified plaintiff by telephone, on June 29, 1956, that its bid had been accepted; this was followed by a written notice of award received on July 2, 1956. The formal contract came shortly thereafter.

Plaintiff proceeded to negotiate with suppliers of the main components of the generator sets and to incur certain other limited costs under the contract. Before it was well launched, however, it received word from the defendant (on August 3, 1956) to suspend all operations under the contract until further notice and to inform its suppliers and subcontractors accordingly. This came about because, unknown to plaintiff, an unsuccessful bidder had prevailed upon the General Accounting Office to rule that the award was improper and the contract should be cancelled. That Office felt that the invitation did not adequately inform bidders as to how they should bid with respect to delivery dates.

Plaintiff's efforts to have the Comptroller General's decision reversed were fruitless, and on September 21, 1956, the contracting officer informed plaintiff that in compliance with the ruling its contract was cancelled. On September 24th, Reiner replied that the Comptroller General's decision was not binding on the Army and that the contractor considered the cancellation a breach for which it would seek recovery of full damages. This suit was then brought for breach of the contract.

Majority Opinion of Court of Claims

I

The initial question is whether the award was illegal and void so that the plaintiff cannot found a court action upon it. This inquiry, we believe, is not precisely the same as that with which the Comptroller General dealt. Because of his general concern with the proper operation of competitive bidding in government procurement,[1] he can make recommendations and render decisions that, as a matter of procurement policy, awards on contracts should be cancelled or withdrawn even though they would not be held invalid in court. He is not confined to the minimal measure of legality but can sponsor and encourage the observance of higher standards by the procuring agencies. Courts, on the other hand, are restricted, when an invitation or award is challenged, to deciding the rock-bottom issue of whether the contract purported to be made by the Government was invalid and therefore no contract at all—not whether another procedure would have been preferable or better attuned to the aims of the competitive-bidding legislation.

In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award,[2] the court should ordinarily impose the binding stamp of nullity only when the illegality is plain. If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit. Any

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[1] For reflections of the Comptroller General's particular interest in the competitive bidding system, see 37 Comp. Gen. 251, 255 (1957); 28 Comp. Gen. 401 (1949); 17 Comp. Gen. 554, 557 (1938); 16 Comp. Gen. 565, 567 (1936).

[2] The rules as to illegality for fraud, conflict of interest, or some like defect, may well be different.

other course could place the contractor in an unfortunate dilemma. If he questions the award and refuses to accept it because of his own doubts as to possible illegality, the contracting officer could forfeit his bid bond for refusing to enter into the contract. The full risk of an adverse decision on validity would then rest on the bidder. If he accedes to the contracting officer and commences performance of the contract, a subsequent holding of non-enforceability would lead to denial of all recovery under the agreement even though the issue of legality is very close; and under the doctrine of quantum meruit there would be no reimbursement for expenses incurred in good faith but only for any tangible benefits actually received by the defendant. *United States* v. *Mississippi Valley Generating Co.*, 364 U. S. 520, 566 n. 22 (1961); *Clark* v. *United States*, 95 U. S. 539, 542 (1877). It is therefore just to the contractor, as well as to the Government, to give him the benefit of reasonable doubts and to uphold the award unless its invalidity is clear. Cf. 17 Comp. Gen. 53, 54-55 (1937).[3]

Applying that norm, we cannot deem this award to have been a nullity. Reiner's bid was responsive to the invitation which allowed the bidders to set their own delivery schedules and went no further than to caution that schedules extending the time over 60 days beyond that designated in the defendant's preferred ("desired") schedule *might* be cause for rejection. There was no statement or indication that time was of the essence. On other occasions plaintiff, answering the same type of invitation, had proposed schedules extending the procurement agency's desired schedule by more than 60 days and had been granted the contracts. This was an accepted form for procurement by the Corps of Engineers. There was no reason to think

[3] As we hold below, the views of the Comptroller General can be largely effectuated and the interests of the Government protected through use of the termination-for-convenience clause to stop performance under the challenged contract.

that in this particular invitation "*may* be cause for rejection" (emphasis added) meant "*will*" or "*shall*" be cause for rejection.

But, defendant urges, this very provision, with its implicit permission to propose longer schedules, vitiated the invitation. The "full and free competition" envisaged by the Armed Services Procurement Act of 1947, § 3, 62 Stat. 21, 22-23, as amended, 69 Stat. 551-52 (1955), 41 U. S. C. § 152 (1952 ed.), was stifled, it is said, by allowing bidders to present their own delivery program, no matter how protracted. One charge levied against this phase of the invitation is that it was so worded that bidders would not understand that they could depart from the listed schedule by more than 60 days. This does not seem probable. The form used the permissive word "may" instead of the mandatory "will" or "shall"; its ordinary meaning would be that bidders took their chances in offering a too-extended schedule but were not barred from shouldering that risk. In previous uses of this standard form bidders had apparently not felt themselves limited to a deviation of 60 days; in this very case others than Reiner extended their suggested dates for more than that period. There is no showing that any bidder was actually misled. Like much procurement prose, the delivery section of the invitation was not a stylist's model, but we think it conveyed its meaning sufficiently to ward off the charge of undue ambiguity.

The second vice defendant marks in the invitation is that it left both bidders and the contracting officer too much at large [1]. The latter might or might not accept a lower bid

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[1] The Armed Service Procurement Act of 1947, as amended, provided in pertinent part (41 U. S. C. § 152(a), (b) and (c) (1952 ed.)):

> Whenever advertising is required—
>
> (a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invita-

with an extended delivery schedule, rather than a "timely" one at a higher price. From the viewpoint of improving procurement procedures, the Comptroller General could well believe that some method of evaluating the bids according to both price and delivery dates should have been explicitly stated. That defect, however, was not so deep or so clear that it nullified the invitation as a matter of law. The bidders were not helpless. They were free to submit more than one bid if the delivery schedule affected their price proposals; they could file, if they wished, one price based on the Government's schedule, another on an extension of less than 60 days, and a third on an extension of over 60 days. The contracting officer, for his part, would be guided by the directives in the Procurement Act of 1947 to consider "the requirements of the agency concerned" and the bid which was "most advantageous to the Government, price and other factors considered." 62 Stat. 23, 41 U. S. C. § 152(a), (b) (1952 ed.). To the extent that quicker

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tions for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

(c) All bids or invitations for bids shall contain in their specifications all the necessary language and material required and shall be so descriptive both in its language and attachments thereto in order to permit full and free competition. Any bid or invitation to bid which shall not carry the necessary descriptive language and attachments thereto, or if such attachments are not available or accessible to all competent, reliable bidders, such bid or invitation to bid shall be invalid and any award or awards made to any bidder in such case shall be invalidated and rejected.

delivery was called for by the procuring agency, the contracting officer would evaluate on the basis of price those bids meeting the earlier delivery requirement; if a delayed schedule turned out to be acceptable, the other bidders would enter the widened circle of competition. That would be the natural and proper way to proceed and that is the way the contracting officer did proceed. The Procurement Act was designed to leave to him business discretion of this type and measure. See S. Rep. No. 571, 80th Cong., 2d Sess., pp. 2-3. In the circumstances present here, the contracting officer did not assume for himself so great an area of judgment as to destroy the free competition (on a common basis) the statute demands. We hold, accordingly, that the award to plaintiff must be deemed lawful, not void.

II

The next inquiry concerns the nature of the cancellation resulting from the Comptroller General's ruling and the damages to which the contractor is entitled. Plaintiff characterizes the cancellation as a clear breach, entailing the full common-law measure of recovery: it points out that the contracting officer did not purport to terminate the contract for the Government's convenience or to follow the procedures established for that kind of termination. Those were in fact the circumstances of the cancellation but the plaintiff's conclusion does not necessarily follow.

If the contracting officer had deliberately employed the termination-for-convenience article of the contract, his action would have been entirely valid. Such termination is authorized "whenever the contracting officer shall determine" that it is "in the best interests of the Government." The broad reach of that phrase comprehends termination in a host of variable and unspecified situations calling (in the contracting officer's view) for the ending of the agreement; the article is not restricted, as plaintiff contends, to a de-

crease in the need for the item purchased. Under such an all-inclusive clause, the Government has the right to terminate "at will" (*Davis Sewing Mach. Co.* v. *United States*, 60 Ct. Cl. 201, 217 (1925), *aff'd* 273 U. S. 324 (1927); *Librach* v. *United States*, 147 Ct. Cl. 605, 611 (1959)), and in the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive. See *Line Constr. Co.* v. *United States*, 109 Ct. Cl. 154, 187 (1947).

Here, termination would have been invoked in deference to the Comptroller General's declaration that the contract should be canceled. The contracting officer did not agree with that opinion, but it is the usual policy, if not the obligation, of the procuring departments to accommodate themselves to positions formally taken by the General Accounting Office with respect to competitive bidding. That Office, as we have pointed out, has special concern with, and supervision over, that aspect of procurement. It would be entirely justifiable for the contracting officer to follow the general policy of acceding to the views of the Accounting Office in this area even though he had another position on the particular issue of legality or propriety. He would not be allowing the Comptroller General to dictate the termination of the contract but, rather, would be using termination as a means of minimizing a conflict with another arm of Government properly concerned with the contractual problem.[5] It cannot be contrary to "the best interests of the Government"—the controlling standard of the termination clause—to end a contract which the Comptroller General has branded as incorrectly advertised.

Plaintiff refers to decisions holding that a contracting officer should not abdicate his functions to another official

[5] If the Comptroller General's view was that the contract was void, termination would itself be inappropriate since the whole contract would be a nullity. Termination, however, would cushion a possible clash with the General Accounting Office.

(*e.g., Sun Shipbuilding & Dry Dock Co.* v. *United States*, 76 Ct. Cl. 154, 187 (1932)), but those were cases in which someone else made specific determinations of fact under the contract, for example, that the contractor was in default or had no excusable delays. In this case the contracting officer would not be shifting a problem to the General Accounting Office; he would simply be deciding that the Government's "best interests" required that as a matter of general policy he bow to an opinion of the Comptroller General on competitive bidding, even though he thought it wrong.

Plaintiff emphasizes, of course, that the contracting officer did not invoke the termination clause as we hold that he could well have done. But this phase of the contractual history does not compel us to hold that in cancelling the contract the contracting officer committed a common-law breach. Almost forty years ago, in *College Point Boat Corp.* v. *United States*, 267 U. S. 12, 15-16 (1925), the Supreme Court gave us the lead (speaking through Mr. Justice Brandeis) in a closely comparable case. The defendant purported to cancel a Navy contract in midstream, without benefit of any power of termination reserved in the agreement and without knowledge that the Navy had such authority under a World War I statute. "[S]o far as appears, neither party knew that the United States had such a right. The Navy Department failed to give the notice requisite to terminate the contract" (*id.* at 15). It appeared on the surface that the defendant was anticipatorily breaching the contract. The Court held, nevertheless, that the contractor could only recover the measure of relief allowed by the termination statute. "A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later."

Id. at 15-16 (footnotes omitted). The Government's right to terminate was held effective when asserted later in court, and recovery of prospective profits was barred.

The Supreme Court's ruling embraces this case. The broad termination clause in plaintiff's contract stands in the place of the statutory termination power involved in *College Point Boat Corp.* (the Act of June 15, 1917, 40 Stat. 182). Under that clause, we have shown above, the defendant had a valid ground to terminate. As the Supreme Court held, such "adequate cause" for termination may be asserted as a defense to a breach action even though it may not have been known at the time of cancellation. The contracting officer on plaintiff's contract probably thought that he was cancelling the agreement for illegality. That excuse was not a valid justification as we now know, but just as in *College Point Boat Corp.* a good ground did exist in the far-reaching right to terminate under the termination article. That justifiable cause controls the case and "operate[s] to curtail the damages recoverable" (267 U. S. at 16).

Some of the foregoing may seem incompatible with certain observations in *Klein* v. *United States*, 152 Ct. Cl. 8, 16-20, 285 F. 2d 778, 782-85 (1961). That case dealt with an erroneous termination for default which the defendant later sought to turn into a convenience termination. The only *holding* of the court (on this point) is that, once the Government wrongfully terminates for default where there has been no default, it cannot thereafter seek to avoid liability by invoking a convenience termination. That holding the court accepts and reaffirms today in *Goldwasser* v. *United States*, Ct. Cl., No. 477-61. Although some portions of the *Klein* opinion may seem to go beyond that holding if taken out of context, we now read the case as confined to the issue of default presented by its facts. Indeed, the *Klein* decision appears to have put aside situations like the present when it said that that case "has no resemblance to that of one who

has terminated a contract for a stated reason, which turns out to be insupportable, but later discovers and relies on a valid reason for cancellation" (152 Ct. Cl. at 19, 285 F. 2d at 784). See also *Newark Fireproofing Sash & Door Co., Inc.* v. *United States*, 107 Ct. Cl. 606, 627, 69 F. Supp. 121, 124 (1947).

Just as the failure to invoke the termination article leaves untouched the defendant's right to rely on the damage limitation of that clause, so the failure to follow the termination procedures of the Armed Services Procurement Regulations (ASPR) is ineffective to broaden plaintiff's rights of recovery. Those regulatory provisions have the force of law (*G. L. Christian and Associates* v. *United States*, Ct. Cl., No. 56-59, decided July 12, 1963, 320 F. 2d 345), but a departure from their requirements does not convert a termination into a common-law breach subjecting the United States to liability for unearned anticipated profits any more than would a deviation from the procedures set forth in a statutory provision for termination. Unless the contractor can show that he has been injured by the failure to pursue the ASPR procedures, such a lapse is immaterial to his recovery. Cf. *J. W. Bateson Co., Inc.* v. *United States*, 308 F. 2d 510, 514 (C. A. 5, 1962). Plaintiff does not claim, and there is no reason to believe, that it was hurt by the informal procedures followed here. As soon as the Comptroller General had ruled, Reiner was told to suspend all operations, to defer incurring any further expenses, and to inform its subcontractors and suppliers. It did so immediately. The amount of plaintiff's termination expenses is known because it has stipulated the exact sum recoverable on the basis of a convenience termination, *i.e.*, $17,000.

This stipulation facilitates our disposition of the case. Since we hold that Reiner is entitled to recover only the amount collectible on a termination for convenience, and

that sum is agreed to be $17,000, we shall enter judgment in that figure.

We add that, in the present circumstances, there is another ground, related but separate, why plaintiff is restricted to this stipulated amount. Even if we assume that the reasoning of *College Point Boat Corp.* is inapplicable, the plaintiff could not recover anticipated but unearned profits without clear and direct proof that it would have made such gains. *United States* v. *Penn Foundry & Mfg. Co., Inc.*, 337 U. S. 198 (1949); *United States* v. *Behan*, 110 U. S. 338, 344 (1884). That type of proof is unavailable here because the plaintiff cannot show that its contract would have been allowed to continue to completion. A standard termination clause was ever-ready for use and it is more than likely that this contracting officer (who thought the award to plaintiff valid) would have acted explicitly under that provision to end performance legally as soon as someone be deemed authoritative had whispered in his ear that he was breaching the agreement by cancelling it in the way he did. Since plaintiff cannot show that that would not have happened, it must fail in its quest for prospective profits. See the opinion of Mr. Justice Douglas for the four concurring Justices in *Penn Foundry & Mfg. Co.*, *supra* at 216.

III

Plaintiff Reiner sues also on behalf of Kurz & Root Company, an actual or potential subcontractor. After Reiner had received the award for the generator sets at the end of June 1956 it negotiated with Kurz & Root to supply the generators, one of the major components. An oral agreement was reached on July 10, 1956, and Kurz & Root then began preliminary work, but no written purchase order was executed prior to suspension of the prime contract on August 3, 1956. At that time Reiner advised Kurz & Root to stop all work. Defendant insists that no valid

subcontract was ever made and that, in any event, nothing is recoverable on behalf of Kurz & Root.

We need not decide (i) whether Reiner had an enforceable agreement with Kurz & Root, (ii) if so, whether Reiner can sue on its subcontractor's behalf, or (iii) whether the claim is barred because not included in Reiner's own termination claim. The record fails to show that the subcontractor suffered any damages from the defendant's cancellation of the main contract. Almost nine months after this cancellation, the Government re-let the very same contract to another company (John R. Hollingsworth Corp.) and Kurz & Root obtained the subcontract to produce the 3,567 generators which it would have supplied to Reiner. It made a good profit on that subcontract, more than would necessarily have been expected and more than it claims it would have made on the subcontract with Reiner. Kurz & Root cannot obtain these profits twice. The Hollingsworth contract and subcontract would never have existed had there been no cancellation of the Reiner contract; nor is there substantial ground for belief that Kurz & Root lost other business because it undertook to supply Reiner. In these circumstances the gains made under the second contract must be deducted from the damages claimed for the alleged breach of the Reiner agreement. *Restatement, Contracts*, § 336, *Comment c; Canton-Hughes Pump Co.* v. *Llera*, 205 Fed. 209, 215 (C. A. 6, 1913); *Ed. S. Michelson, Inc.* v. *Nebraska Tire & Rubber Co.*, 63 F. 2d 597, 601 (C. A. 8, 1933).

Kurz & Root did incur some preliminary expenses on the Reiner generator but there is no evidence whether or not this work was useful in the performance of the Hollingsworth subcontract; moreover, the evidence of these out-of-pocket expenses was not well supported. On the whole record, we are justified in finding, as we do, that Kurz & Root has failed to prove that it was damaged to any appreciable extent by the suspension and cancellation of the Reiner contract. No right to recover has been shown.

Our conclusion is that plaintiff is entitled to recover $17,000 on its own claim and judgment will be entered to that effect. It is not entitled to recover on behalf of Kurz & Root Company and its petition will be dismissed to that extent.

LARAMORE, *Judge*, concurring:

I agree with the majority opinion. I write this because of my concurrence in the case of *Goldwasser v. United States*, No. 477-61, this day decided.

In my opinion, the *Goldwasser* case is clearly distinguishable from the present case. The contract in the case of *Goldwasser* was, in my opinion, terminated for default. In that situation my belief is that plaintiff Goldwasser should have an opportunity to prove a breach thereof and resulting damages, if any.

The contract in the instant case was not terminated for default, and I believe under the circumstances of this case the correct measure of damages should be based on the cost resulting from the termination provision of the contract.

WHITAKER, *Judge*, dissenting in part:

Having written the opinion of the court in *Goldwasser v. United States*, Ct. Cl. No. 477-61, this day decided, it follows that I disagree with the opinion in this case. It reiterates, I think, the positions taken in the dissenting opinions in the *Goldwasser* case.

In *Goldwasser*, the defendant became dissatisfied with plaintiff's performance but it did not refuse further to honor the contract because plaintiff had defaulted in performance, but, instead, took refuge in the "indefinite-quantities" clause of the contract, contending that under that clause it was no longer obligated to avail itself of plaintiff's services. Because we thought this clause was inapplicable and that defendant had wrongfully refused to

further honor the contract unless plaintiff was actually in default, and because it did not take advantage of the termination-for-convenience-of-the-Government clause, we held this clause did not prescribe the measure of defendant's liability, if any.

Nor in the case at bar did defendant take advantage of the termination-for-convenience-of-the-Government clause; it cancelled the contract because, acting upon the opinion of the Comptroller General, it held that it had been awarded without compliance with the statute and was, therefore, a nullity. It is a contradiction to say that it terminated a contract that in law it asserted had never existed. Whether it had a right to do so or not is immaterial, because it did not in fact do so. The possession of a right means nothing unless that right is exercised.

As in the *Goldwasser* case, a cancellation of the contract because it had been illegally entered into involved no liability on the part of the Government; a termination for convenience did render the Government liable. The Contracting Officer chose the former course. The Government is bound by the action he took.

What I have said is in harmony with our holding in *Klein v. United States*, 152 Ct. Cl. 8, 285 F. 2d 778 (1961).

The majority relies upon *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925), affirming 58 Ct. Cl. 380 (1923), but in that case there was no election by the Government between two alternative courses of action, one of which subjected the Government to liability and the other did not.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Paul H. McMurray, and the briefs and arguments of counsel, making findings of fact as follows:

1. Plaintiff John Reiner & Company (sometimes hereinafter referred to as Reiner) was a limited partnership at times material herein which formerly had its principal place of business at Long Island City, New York. In 1956 Reiner was a manufacturer of special-purpose generator sets and pump units. The firm was also an exclusive distributor in New York, New Jersey, Pennsylvania, and the New England states of machinery and equipment manufactured by others, maintaining distributor branches in Syracuse, New York, Springfield, Massachusetts, and Flemington, New Jersey.

2. Reiner received from defendant, acting through the United States Army Corps of Engineers, Chicago Procurement Office, Invitation No. DA-ENG-11-184-56-F-707, requesting bids for the furnishing of 3,567 5KW generator sets. The invitation, originally issued under date of May 18, 1956, and amended by four addenda, contained the following special terms and conditions as to delivery of the generator sets (Item 1) and a tabular list of parts (Item 3):

> 11. *Delivery Schedule*: The Government desires delivery of the articles or supplies awarded under this invitation in accordance with the following schedule:
>
> | *Item 1* | *Item 3* |
> |---|---|
> | 172 units 30 Sept. 1956 | 6 each—31 Oct. 1956 |
> | 300 units 31 Oct. 1956 | |
> | 300 units 30 Nov. 1956 | |
> | 300 units 31 Dec. 1956 | |
> | 350 units 31 Jan. 1957 | |
> | 350 units 28 Feb. 1957. | |

Item 1	*Item 3*
350 units 30 Mar. 1957	
350 units 30 Apr. 1957	
350 units 31 May 1957	
350 units 29 June 1957	
350 units 31 July 1957	
45 units 31 Aug. 1957	

In the event bidder is unable to make deliveries in accordance with the foregoing schedule, he shall set forth in the space below his proposed delivery schedule:

Bidder's Proposed Delivery Schedule:

[Blank space of several lines provided in form.]

Bids offering a proposed delivery schedule which will extend the time for delivery of the quantities as called for in any delivery period of the foregoing delivery schedule by more than 60 days, may be cause for rejection of bid.

In the event a bidder does not set forth a proposed delivery schedule the Government's delivery schedule as hereabove set forth shall be bidder's proposed delivery schedule.

The General Provisions provided:

12. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may apeal by mailing or otherwise furnishing to the Contracting Officer a written appeal

addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

* * *

21. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall (1) stop work under the contract on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services, or facilities

except as may be necessary for completion of such portion of the work under the contract as is not terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by that Notice of Termination; (4) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts; (5) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause; (6) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (ii) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Government; (7) use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in provision (6) of this paragraph, provided, however, that the Contractor (i) shall not be required to extend credit to any purchaser, and (ii) may acquire any such property under the conditions prescribed

by and at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this Contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest. At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same, provided that the list submitted shall be subject to verification by the Contracting Officer upon the removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim, in the form and with the certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than two years from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer, upon request of the Contractor made in writing within such two-year period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such two-year period or any extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer may determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts

which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(1) For completed supplies accepted by the Government (or sold or acquired as provided in paragraph (b) (7) above) and not theretofore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges:

(2) The total of—

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e)(1) hereof:

(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b)(5) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts shall be included in the cost payable under (i) above).

(iii) A sum equal to 2% of that part of the amount determined under (i) which represents the cost of articles and materials not processed by the Contractor, plus a sum equal to 8% of the remainder of such amount, but the aggregate of such sums shall not exceed 6% of the whole of the amount determined under subdivision (i) above, which amount for the purpose of this subdivision (iii) shall exclude any charges for interest on borrowings; Provided, however, that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (iii) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this contract. The total sum to be paid to the Contractor under (1) and (2) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in paragraph (e) (1) and paragraph (e) (2) (i), the fair value, as determined by the Contracting Officer, of property which is destroyed, lost, stolen, or damaged so as to become

undeliverable to the Government, or to a buyer pursuant to paragraph (b) (7).

(f) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the Statement of Principles for Consideration of Costs set forth in Part 4 of Section VIII of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(g) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination made by the Contracting Officer under paragraphs (c) or (e) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this clause there shall be deducted (1) all unliquidated advance or other unliquidated payments on account theretofore made to the Contractor, (2) any claim which the Government may have against the Contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the

provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6% per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from

the effective date of termination and for a period of six years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor but without direct charge to the Government, all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproductions thereof.

3. Reiner submitted a bid of $1,092 per unit for the generator sets, or a total price of $3,895,164 for the contract. As a delivery schedule it proposed that the units be delivered as follows:

Item 1	*Item 3*
172 Units Jan. 31, 1957	6 each—Nov. 30, 1956
300 Units Feb. 28, 1957	
300 Units Mar. 30, 1957	
300 Units Apr. 30, 1957	
350 Units May 31, 1957	
350 Units June 29, 1957	
350 Units July 31, 1957	
350 Units Aug. 31, 1957	
350 Units Sept. 30, 1957	
350 Units Oct. 31, 1957	
350 Units Nov. 30, 1957	
45 Units Dec. 31, 1957	

Subsequently, by telegram dated Jun 20, 1956, plaintiff reduced its offer to $1,042 per unit, or $3,716,814 on the total contract.

4. The bids were publicly opened by defendant on June 21, 1956. As to price, Reiner was the lowest of thirteen bidders. In addition to Reiner, seven other bidders proposed their own delivery schedules.

The Corps of Engineers thereafter inquired of the requisitioning agency, the United States Army Signal Corps, Philadelphia, whether Reiner's proposed delivery schedule met its requirements. On June 26, 1956, the requisitioning agency replied that the proposed delivery schedule was satisfactory and met its requirements.

5. On June 29, 1956, defendant notified Reiner by telephone that its bid in response to the invitation had been accepted, and Reiner was authorized to proceed with the performance of contract DA-11-184-ENG-14933 (hereinafter referred to as the prime contract). Written notice of award was received by Reiner on July 2, 1956.

6. On August 3, 1956, following a telephone conversation between Maj. Stanley Boriss, Chief of Production Branch, Corps of Engineers, and David I. Cohen, Reiner's assistant general manager, the contracting officer sent to Reiner a telegram containing the following text:

> REF PURCHASE ORDER 88-V-41390-27, CONTRACT NO. DA-ENG-11-184-56-F-707 FOR 5 KW GENERATORS. SUSPEND ALL OPERATIONS IN PERFORMANCE OF THIS CONTRACT UNTIL FURTHER NOTICE: INFORM YOUR SUPPLIERS AND SUBCONTRACTORS ACCORDINGLY TO AVOID INCURRING ANY COSTS. THIS INSTRUCTION BASED ON DECISION OF GENERAL ACCOUNTING OFFICE AND CONFIRMS TELEPHONE CONVERSATION BETWEEN YOUR MR. COHEN AND MAJOR BORISS.

7. In a telephone conversation, Major Boriss advised Reiner's assistant general manager that the General Accounting Office, based on a protest by an unsuccessful bidder,

had recommended that the prime contract be cancelled. Major Boriss stated that the requisition had not been withdrawn by the requisitioning agency; that the generator sets were needed; and that the Chicago Procurement Office was not satisfied with the recommendation of the General Accounting Office.

8. Reiner had not been notified previously by the United States Army or the General Accounting Office of the protest by an unsuccessful bidder and had no prior knowledge of its existence.

9. Reiner notified Hercules Motors Corporation and Kurz & Root Company, the subcontractors with whom it had made agreements for the manufacture of the engine and the generator, of the contents of the contracting officer's telegram of August 3, 1956.

10. The decision of the Comptroller General (No. B-128405 dated August 3, 1956) referred to in the telegram of August 3, 1956 (finding 6), stated:

> Reference is made to letter dated July 20, 1956, from Mr. F. H. Higgins, Assistant Secretary of the Army (Logistics), forwarding an administrative report on the protest of United States Motor Corporation against the award of a contract to another bidder pursuant to invitation No. DA-ENG-11-184-56-F-707 issued May 18, 1956, by the Chicago Procurement Office, Corps of Engineers.
>
> The invitation as amended by Addenda dated May 29 and June 1, 7, and 8, 1956, requested bids for furnishing generator sets under item No. 1, with tabular list of parts, provisioning list and drawings, the cost of which was to be included in the price quoted from item No. 1. The invitation expressly provided that all items would be awarded as a lot

and that the Government desired delivery of the equipment awarded under the invitation in accordance with the following schedule:

Item 1	*Item 3*
172 units 30 Sept. 1956	6 each—31 Oct. 1956
300 units 31 Oct. 1956	
300 units 30 Nov. 1956	
300 units 31 Dec. 1956	
350 units 31 Jan. 1957	
350 units 28 Feb. 1957	
350 units 30 Mar. 1957	
350 units 30 Apr. 1957	
350 units 31 May 1957	
350 units 29 June 1957	
350 units 31 July 1957	
45 units 31 Aug. 1957	

Bidders were advised that in the event they were unable to make deliveries in accordance with the foregoing schedule they should set forth in the space provided therefor the delivery schedule they proposed. Bidders were advised also that "bids offering a proposed delivery schedule which will extend the time for the delivery of the quantities as called for in any delivery period of the foregoing delivery schedule by more than 60 days, may be cause for rejection of bid", and that should a bidder not set forth a proposed delivery schedule of its own the Government's delivery schedule set forth in the invitation would be regarded as the bidder's proposed delivery schedule.

The record shows that 13 bids were received in response to the invitation and that the bid of the John Reiner and Company was the lowest received as to price. This bidder, however, offered the following delivery schedule:

Findings of Fact

Item 1	*Item 3*
172 units Jan. 31, 1957	6 each—Nov. 30, 1956
300 units Feb. 28, 1957	
300 units Mar. 30, 1957	
300 units Apr. 30, 1957	
350 units May 31, 1957	
350 units June 29, 1957	
350 units July 31, 1957	
350 units Aug. 31, 1957	
350 units Sept. 30, 1957	
350 units Oct. 31, 1957	
350 units Nov. 30, 1957	
45 units Dec. 31, 1957	

The next low bid was that submitted by the United States Motors Corporation. This bidder, and four other bidders, offered delivery in strict accordance with the delivery schedule set forth in the invitation. It is stated by the contracting officer that his request of the requisitioning agency for information as to whether the delivery offered by the John Reiner and Company met its requirements elicited the reply that the delivery schedule offered by that bidder was satisfactory and met the requirements. The contract was then awarded to that bidder.

The protest of the United States Motors Corporation as presented to our Office is predicated upon the following contentions:

"1. We were low bidder complying in all respects to the terms and conditions of the referenced invitation.

"2. No exceptions or alternate bids were acceptable under the provisions of the invitation.

"3. If delivery is of importance to the requisitioning agencies as indicated by the delivery requirements, no exception should be considered unless a like exception is extended to all bidders.

"4. If delivery is not of consequence to the requisitioning agencies, then a restrictive or suggestive clause that refers to the possible rejection of a bid exceeding by more than sixty days the desired delivery, should not have been included in the invitation".

Section 3(b) of the Armed Services Procurement Act of 1947, 62 Stat. 21, 23, provides that all bids shall be publicly opened at the time and place stated in the advertisement and that "Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered". The purpose of this statute is, of course, to afford all bidders an opportunity to bid on an equal basis.

We have held that time of delivery may be considered in making an award, price alone not being controlling, when early delivery is required in the Government's interest, and when the invitation to bid so provides, all bidders thus being placed on notice and given an equal opportunity to compete for the Government's business. In the present case the advertised specifications expressly advised bidders that the Government desired delivery of the equipment on the dates and in the quantities set forth in the bid schedule. The reasonable interpretation of this delivery provision is that the Government required the equipment on the dates and in the quantities stated. While the invitation for bids purported to afford an opportunity to bidders to propose a

different delivery schedule if they could not meet the Government's delivery requirements, the force and effect thereof was virtually eliminated by the further provision to the effect that any proposed delivery schedule which would extend the time for delivery as called for in the Government's "delivery schedule by more than 60 days, may be cause for rejection of bid". It would seem only logical to assume that, in the face of this clear admonition, those bidders who promised delivery in compliance with the Government's delivery requirements did not propose any longer schedule since no useful purpose apparently would be served thereby.

If the requisitioning agency did not actually require delivery on the dates specified then the dates should have been extended in line with the Government's requirement, or some alternative should have been left to the bidders to offer longer delivery schedules at lower prices, in which event, of course, some method of evaluating the bids according to price and delivery dates should have been stated. Had all bidders been given an opportunity to bid on the basis of the delivery schedule offered by the low bidder as being the time required by the Government, it is reasonable to assume that additional bids would have been received quoting more favorable prices and that those bidders quoting prices for delivery within the time stated as desired by the Government might have quoted prices even lower than that quoted by the successful bidder.

Under the circumstances we have no alternative but to conclude that the award as made does violence to the spirit and purpose of the law due to the fact that the bidders were not properly advised as

to the basis upon which bids should have been submitted. Hence, the contract should be cancelled.

11. Reiner had observed the same delivery clauses in other prior invitations as was contained in the invitation involved herein and had on other occasions proposed delivery schedules extending the procurement agency's desired schedule by more than 60 days, and had been awarded contracts on such invitations when the bid was lowest in price. The same form of "delivery schedule" provisions had previously been used by the Corps of Engineers in many invitations.

12. Reiner's attempt to have the Comptroller General's decision reversed was unsuccessful, and on September 21, 1956, the contracting officer sent Reiner a telegram as follows:

> IN REPLY REFER TO ENGPB-3-1785 SGD COL MURRAY CONTRACTING OFFICER. IN REGARDS CONTRACT DA-11-184-ENG-14933 PO 88-F-41390-27. THE COMPTROLLER GENERAL OF THE UNITED STATES IN HIS DECISION B-128045 [sic] 3 AUGUST 1956 RULED THAT THE INVITATION FOR BID FORMING THE BASIS FOR THE AWARD OF THIS CONTRACT WAS AMBIGUOUS AS TO DELIVERY REQUIREMENT AND THAT THIS CONTRACT SHOULD BE CANCELLED. BY LETTER DATED 17 SEPTEMBER 1956 THE COMPTROLLER GENERAL REAFFIRMED HIS DECISION B-128045 [sic]. IN COMPLIANCE WITH THIS DECISION YOU ARE HEREBY NOTIFIED THAT YOUR CONTRACT DA-11-184-ENG-14933 PO 88-F-41390-27 AWARDED YOUR CONCERN BY THIS OFFICE ON 29 JUNE 1956 IS HEREBY CANCELLED.

13. At the time the telegram was sent, the Armed Services Procurement Regulation contained, in part, the follow-

ing provisions as to termination of contracts (Federal Register of February 29, 1952, p. 1791):

§ 407.302 *Authority of Contracting Officers.* The authority of the Contracting Officer to terminate a contract for the convenience of the Government and to enter into settlement agreement under this subchapter is set forth in the termination clause. Contracting Officers may terminate contracts for the convenience of the Government to the extent authorized by procedures prescribed by each respective department.

* * *

§ 407.304 *Notice of Termination.* Contracts subject to termination for convenience shall be terminated only by written notice to the Contractor conforming substantially to the form of Notice of Termination set forth in Subpart G of this part. Modification of such form is authorized, but in any event each such Notice shall state: (a) That the contract is being terminated for the convenience of the Government under the provisions of the termination for convenience clause thereof, (b) the effective date of termination, (c) the extent of termination and if a partial termination, the portion of the contract to be continued, and (d) any special instructions. A copy of the Notice of Termination shall be sent to any known assignee, guarantor or surety of the Contractor.

* * *

§ 407.707 *Notice of Termination.*

§ 407.707-1 *Telegraphic Notice of Termination.*

(a) The following form of telegraphic notice is approved for use where a contract is being completely terminated:

TELEGRAPHIC NOTICE—COMPLETE TERMINATION

Date ————————

XYZ Corporation,
New York, New York.

Your Contract No. ———— is hereby terminated in its entirety pursuant to clause ———— of the contract effective [here insert "immediately" or "on ———— ———— 19—". (Inserting the date) or "as soon as you have delivered thereunder including previous deliveries the following items" (listing items)]. Immediately stop all work, terminate subcontracts and place no further orders except to extent (insert if applicable—necessary to perform any portion thereof not terminated hereby or) that you or a subcontractor wish to retain and continue for own account any work in process or other materials. Telegraph similar instructions to all subcontractors and suppliers. Letter and instruction follow.

————————
(Name and Rank)
Contracting Officer

* * *

§ 407.707-2 *Letter Notice of Termination.* (a) In accordance with § 407.364, the following form of Notice of Termination of prime contract is approved for use. With appropriate modifications it is suitable for use in terminating subcontracts.

LETTER NOTICE OF TERMINATION TO PRIME CONTRACTORS

[At the top of the Notices set out all special details relating to the particular termination: e.g., name and address of company, number of prime contract terminated, service involved, appropriation or allotment, etc.

Findings of Fact

Two alternative forms of paragraph No. 1 are set out below. If this written termination notice confirms a telegraphic notice previously sent, use the first of the alternative paragraphs No. 1 below. If no previous telegraphic notice has been sent, use the second.]

1. *Effective date of termination.* This letter will confirm the Government's telegram to you dated ————— ————, 19—, terminating [in part] your Contract No. ————— (hereinafter referred to as "the contract") for the convenience of the Government, in accordance with the clause thereof entitled "Termination for the Convenience of the Government" [or, in the case of a cost-type contract, "Termination"]. Such termination is effective on the date and in the manner stated in such telegram, reference to which is hereby made [or copy of which is attached hereto].

(or)

1. *Effective date of termination.* You are notified that your Contract No. ————— (hereinafter referred to as "the contract") is hereby terminated [in part] for the convenience of the Government, in accordance with the clause thereof entitled "Termination for the Convenience of the Government" [or, in the case of cost-type contract, "Termination"]. Such termination will be effective:

[Here insert either "immediately upon your receipt of this Notice" or "on ————————— 19—," (inserting the date), or "as soon as you have delivered under the contract the following number of each of the items listed below, including those heretofore delivered, to wit: ———— ————————" or, "on ————————, 19—, on which date you are hereby directed to reduce the total number of items to be delivered under the contract as follows": (here insert instructions as to reduced deliveries).]

Findings of Fact

2. Cessation of work and notification to your immediate subcontractors. (a) You shall stop all work, make no further shipments, and place no further orders in connection with the contract, except (1) to the extent necessary to perform any portion thereof not terminated by this Notice, or (2) to the extent that you may wish to retain and continue any work in process or other materials for your own account, or (3) to the extent the Contracting Officer authorizes you to continue work-in-process for reasons of safety, or to clear [or avoid damage to] equipment or to avoid immediate complete spoilage of work-in-process having a definite commercial value, or otherwise to prevent undue loss to the Government. [If you believe the authorization referred to in subparagraph (3) above is necessary or advisable you shall immediately notify the Contracting Officer by telephone or personal conference and obtain instructions.] You shall keep adequate records of your compliance with this paragraph 2(a) showing (i) the date you received your Notice of Termination, (ii) the effective date of such termination, and (iii) the extent of completion of performance on such effective date.

(b) You shall give notice of termination to each of your immediate subcontractors (including suppliers) who will be affected by the termination of your Contract. In such notice you shall (1) give him the number of your Contract with the Government, (2) state that it has been terminated (or terminated in part, if that is the case) for the convenience of the Government, (3) give him the name and address of the Contracting Officer, (4) instruct him to stop all work, to make no further shipments, to place no more orders, and to terminate all subcontracts under this contract with you (subject to the same exceptions stated in paragraph 2(a), (5) direct him to submit his settlement proposal promptly in order to expedite settlement, and (6)

request him to give similar notice and instructions to his immediate subcontractors.

(c) You shall notify the Contracting Officer of the number of articles completed under the Contract and still on hand, and arrange with him for their delivery or other disposal.

(d) You shall forthwith transfer title to and deliver to the Government, in accordance with any instructions of the Contracting Officer, all items of termination inventory (including subcontractor termination inventory which under the terms of the subcontract or purchase order concerned you have the right to take over) of the following types or classes: [Insert proper identification or "none."]

(e) You shall notify the Contracting Officer of any pending legal proceedings which relate to any subcontracts or purchase orders under the terminated contract or which have resulted in or which are intended to result in a lien or encumbrance on any termination inventory other than termination inventory you propose and are authorized to purchase, retain, or dispose of. (The Contracting Officer shall also be promptly notified of any such proceedings brought after receipt of this Notice.)

(f) You shall take such other action as may be required by the Contracting Officer or under the termination clause contained in your contract.

3. *Termination inventory.* In connection with settlement of your claim, it will be necessary to establish that all your termination inventory and that of your subcontractors has been properly accounted for. For detailed information, see Part 6 of Section VIII of ASPR.

4. *Completed articles.* Subject to paragraph 8-502 of ASPR, you will invoice acceptable completed articles under

the contract in the usual way and not include them in your settlement proposal.

5. *Submission of settlement proposal.* To assist you in prompt submission of your settlement proposal, there is inclosed one set of the standard forms.

6. *Patents.* Your attention is called to any provisions of the contract which may require you to make a disclosure of, and to deliver to the Government instruments of license or assignment respecting all inventions, discoveries, and patent applications made by you in the performance of the contract. You are urged to forward such disclosures and instruments of license or assignment to the Contracting Officer promptly, inasmuch as these contractual obligations must be complied with before execution of the final settlement agreement. This paragraph may be disregarded if the contract contains no such patent provisions.

7. *Settlements with subcontractors.* You remain liable to your subcontractors and suppliers for claims arising by reason of the termination of their subcontracts or orders. You are requested to settle such termination claims as promptly as possible. For purposes of reimbursement by the Government, such settlements will be governed by the provisions of Parts 4 and 5 of Section VIII of ASPR.

8. The Office named below will be in charge of the settlement of your claim. As to any matters not covered by this Notice, you should consult the Office named below.

9. Please acknowledge receipt of this Notice as shown below. Enclosures:

.....
(Contracting Officer)

.....
(Name of Office)

.....
(Address)

ACKNOWLEDGEMENT OF NOTICE

The undersigned hereby acknowledges receipt of a signed copy of the foregoing Notice on ....., 19... Two copies of this Notice, both signed, are herewith returned.

.....
(Name of Contractor)

By .....

.....
(Title)

14. Reiner did not receive a telegram or letter from the contracting officer specifically stating that the prime contract was terminated for the convenience of the Government pursuant to clause 21 of the General Provisions of the prime contract. The contracting officer did not send to Reiner a set of standard forms for the submission of a settlement proposal of its termination claims, nor did the contracting officer request Reiner to settle the termination claims of its subcontractors and suppliers.

15. On September 24, 1956, Reiner replied to the telegram of September 21, 1956, from the contracting officer with a telegram as follows:

REFER TO ENG PB-3-1785 SGD COL. MURRAY CONTRACTING OFFICER. IN REGARD TO CONTRACT DA-11-184-ENG-14933 PO 88-F-41390-27, WE CALL YOUR ATTENTION TO COURT DECISIONS HOLDING THAT THE RULING OF THE COMPTROLLER GENERAL IN SUCH MATTERS IS NOT CONTROLLING UPON THE DEPARTMENT OF THE ARMY. YOU ARE HEREBY ADVISED THAT YOUR NOTICE OF CANCELLATION IS DEEMED A FORMAL ADMISSION OF BREACH OF CONTRACT ON THE PART OF YOUR DEPARTMENT AND THAT WE INTEND TO SEEK RECOVERY OF FULL DAMAGES FOR SAID BREACH AND TO PURSUE SUCH OTHER REMEDIES AS MAY BE ADVISABLE.

16. At the time when the contract was cancelled, Reiner desired to continue performance and had the physical facilities, the personnel, the financing and the knowledge to complete the contract.

17. The parties have stipulated that if it should be determined that Reiner's individual claim is to be restricted to the costs recoverable on the basis of a termination for the convenience of the Government, Reiner would be entitled to recover $17,000.

18. Reiner claims individual damages for breach of the prime contract by defendant of $457,713, consisting of estimated loss of profits of $440,713 plus unrecovered costs of $17,000. Plaintiff determined its claim by adding estimated costs of material, direct labor, and overhead, and deducting this sum from the contract price.

19. Kurz & Root Company (Incorporated) (hereinafter referred to as Kurz & Root) is a Wisconsin corporation, organized in 1898, which has its principal plant and place of business in Appleton, Wisconsin. In 1956 it was a manufacturer of rotary electrical equipment, primarily gene-

rators. Approximately 90 percent of its manufacturing was for the United States Department of Defense, as both a prime contractor and subcontractor. It had approximately 200 employees in its plants at Appleton and Seymour, Wisconsin, and Los Angeles, California. Kurz & Root has manufactured more than 50,000 generators. Eugene B. Brownell, its president, was the sole owner of Kurz & Root at times material herein. In May 1961 he owned approximately 86 percent of the stock which would have been reduced to 80 percent if certain key employees had elected to take up stock options held by them.

20. After Reiner had been awarded the prime contract involved in this action, Brownell, as president of Kurz & Root, entered into negotiations with John Merk, Reiner's general manager, in an effort to obtain a subcontract for the generators. On July 10, 1956, at Reiner's offices, they reached an oral agreement that Kurz & Root would furnish the generators to Reiner at a price of $200 per unit, delivery to be made 60 days prior to the dates proposed by Reiner in the prime contract and in the quantities therein specified.

21. Reiner assigned Purchase Order No. RM 16200 for contemplated use in submitting an order to Kurz & Root, but had not written up such purchase order nor placed any information regarding the verbal agreement with Kurz & Root on the purchase order prior to suspension and cancellation of the prime contract.

22. Kurz & Root began certain necessary preliminary work on the 5KW generator which it planned to supply Reiner, after the oral agreement of July 10, 1956.

23. After the suspension of August 3, 1956, Reiner advised Kurz & Root by telephone to stop work under the

subcontract. On August 6, 1956, Kurz & Root was notified that the contracting officer had ordered suspension of all operations in performance of the prime contract and had required Reiner to notify subcontractors to avoid incurring any further costs.

24. The New York Statute of Frauds provides:

> § 31. *Agreements required to be in writing.* Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;
>
> 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime. (As amended L. 1911, c. 571, § 2; L. 1933, c. 616; L. 1943, c. 104; L. 1949, c. 203, eff. Sept 1, 1949; Personal Property Law, § 31.)

The evidence does not show that Kurz & Root would have delivered all the generators needed for Reiner's contract within a year's time, although the same number of similar generators was subsequently produced in approximately one year for another contractor (finding 29).

25. On August 7, 1956, Kurz & Root wrote Reiner, in pertinent part, as follows:

> In accordance with your advice, we have ceased all further activity here and have placed a hold on our suppliers in reference to this order.
>
> * * *
>
> We are further quite disturbed because we have based our 1957 operations upon this contract as the

backlog contract. Knowing that we had this order, we have refrained from bidding on certain other business that we otherwise would have gone after. It is now too late to seek that business. Further, in one case we bid higher than we would have except for having this backlog contract and we missed an award for that reason. We have also arranged to subcontract certain business which we now cannot bring back into our plant. I cite these examples to show you the difficulties we run into when we have a hold up of this character.

If there is a substantial delay before we are able to proceed, it will be necessary for us to adjust our price upward.

26. Kurz & Root was subsequently notified by Reiner that the prime contract had been cancelled.

At the time of the cancellation Kurz & Root had the facilities, the knowledge, and the financial capacity to perform this subcontract.

27. Kurz & Root has insisted that Reiner is liable for breach of a subcontract, and requested Reiner to include its claim in Reiner's action against defendant. However, in view of the circumstances of cancellation, Kurz & Root advised Reiner they would not press for payment of their claim if plaintiff does not prevail in this suit.

28. Plaintiff claims damages to the use of Kurz & Root of $167,383, consisting of (1) estimated loss of profits of $157,744 plus (2) unrecovered out-of-pocket costs of $9,639. The latter item is based primarily on a computation which is arrived at by using estimated costs.

Findings of Fact

29. After cancellation of the prime contract here involved, the same contract was re-let as DA-ENG-11-184-57-F-616 JD, the date of invitation being March 26, 1957. Plaintiff Reiner bid on this contract also, but was unsuccessful, and the contract was awarded to the John R. Hollingsworth Corp. Although this re-let contract was not put in evidence, two of Reiner's witnesses, Nicholas and Brownell, admitted that the contract involved in this suit was re-let. Kurz & Root obtained the subcontract from Hollingsworth to produce the 3,567 generators involved. These units were produced by Kurz & Root for Hollingsworth. They were priced at $180 each and were basically the same as the unit which was to have been produced previously for Reiner, except that they lacked certain accessories, including a fan, etc., which was to have been included in the Reiner unit (see finding 46). Kurz & Root made more profit on the Holingsworth contract than would necessarily have been expected and more than it claims it would have made on the Reiner subcontract ($21.69 per unit). Production under the subcontract proceeded in a satisfactory manner. Brownell testified that Kurz & Root's profit amounted to $23.87 per unit on the Hollingsworth contract. Kurz & Root produced this generator for Hollingsworth almost entirely in its fiscal year 1958, while the Reiner subcontract would have been produced primarily in fiscal 1957. No evidence was offered to show whether any portion of the prior preliminary work on the Reiner generator was useful in the performance of the re-let contract to Hollingsworth.

30. Kurz & Root's claim for out-of-pocket expenses was based on estimates which primarily consisted of wages estimated in hours, for various employees and for Brownell, on work performed for Reiner. The claimed expenses were estimated as follows:

Prototype, material, labor, and overhead	$ 676
Engineering costs	1,423
Estimating costs	283
Purchasing Department	348
Executive costs	1,200
Administration	388
Additional overhead at 50% of special costs ..	1,821
Settlement fees and costs	3,500
Total	9,639

31. For the most part, claimed out-of-pocket expenses of Kurz & Root lack supporting evidence. The evidence reveals that the drawings submitted to Reiner, consisting of about 10 or 12 drawings, actually were prepared for previous contracts except for a top layout drawing which included the various components included in the other drawings submitted. These various component drawings were selected by Kurz & Root from its files based on their suitability for the Reiner contract. The evidence supports a finding that Kurz & Root improperly or erroneously included in this claim (1) settlement costs of $3,500, (2) the time spent with defendant's auditors in connection with this claim, and (3) executive salary at $15 per hour.

32. Assuming that Kurz & Root could not use any of the preliminary work performed for Reiner on the Hollingsworth or any other contract, the proof does not warrant a finding that out-of-pocket expenses of Kurz & Root were more than $5,000. Defendant's computation resulted in an amount of $3,209. There is no adequate proof that Kurz & Root could not or did not make use of this preliminary work for the Hollingsworth or some other contract.

33. Kurz & Root made its verbal agreement with Reiner on July 10, 1956. The suspension was made on August 3,

1956. The assumption that defendant was responsible for maintaining a volume of business for Kurz & Root of $713,400 in addition to what could be obtained elsewhere for portions of the following 2 fiscal years (December 1956 through November 1957), and the further assumption that no fixed overhead or general and administrative expenses would be applicable to this contract, are improper and unwarranted. Kurz & Root was responsible for acquiring such other work as it could obtain to maintain its proper volume of business. If Reiner had an agreement with Kurz & Root, it existed only for about 3½ weeks prior to suspension. Had Kurz & Root not obtained the re-let contract from Hollingsworth the following year, it admittedly would have obtained other work to replace what was lost under the subcontract. Whatever volume of business was lost during fiscal 1957 was gained in fiscal 1958, when Kurz & Root successfully obtained the subcontract for the 3,567 generators from Hollingsworth. Kurz & Root's volume of business in fiscal 1957, the year in which most of this contract was to have been performed, was greater than in any of the previous 5 years, and also more than fiscal year 1958, when the re-let Hollingsworth contract was actually performed.

34. Kurz & Root obtained a subcontract under the re-let contract for the same generator sets as are involved in the suit here, and produced these units primarily in fiscal 1958 rather than in fiscal 1957 as was originally contemplated under the agreement with Reiner. The proof does not show that Kurz & Root was damaged to an appreciable extent by the suspension and cancellation of the Reiner contract.

Conclusion of Law and Judgment

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover only $17,000 on its own claim, and it is therefore adjudged and ordered that plaintiff recover from the United States the sum of seventeen thousand dollars ($17,000), on its own claim. Otherwise the petition is dismissed, including the claim for the use of Kurz & Root Company (Incorporated).

APPENDIX B

IN THE

UNITED STATES COURT OF CLAIMS

No. 477-61

(Decided December 13, 1963)

NEIL A. GOLDWASSER, doing business as Century Offset Company v. THE UNITED STATES.

Before JONES, Chief Judge, and WHITAKER, LARAMORE, DURFEE and DAVIS, Judges.

WHITAKER, Judge.

This is an action for breach of contract. Both parties have moved for summary judgment.

On July 18, 1960, plaintiff was awarded a Department of the Navy contract to print and deliver a weekly newspaper called the Shipworker at New York Naval Shipyard. The contract was to run from August 1, 1960 to June 30, 1961. The estimated total contract price was $40,000. After plaintiff had printed the editions of the Shipworker from August 5, 1960 to October 21, 1960, he was orally advised that no further issues would be ordered from him. Plaintiff was thereafter given no more printing under the contract, and the remaining numbers of the Shipworker were printed by another printer.

Plaintiff claims that this was a requirements contract and that each failure on defendant's part to order its weekly requirements for the printing of the newspaper from him was a breach of contract. Defendant denies that this was a requirements contract; it says that after it had paid for delivery of the first edition of the newspaper at a price exceeding $100.00, it was free to give its printing business to whomever it chose. In support of its position, defendant points to the "Indefinite Quantities" clause of the Invitation for Bids:

"INDEFINITE QUANTITIES

"The total quantities specified herein are estimates only. The amounts which the Contractor may be required to furnish and the Government to accept hereunder shall be the amounts which shall from time to time be ordered hereunder by the Government during the ordering period of this contract. In any event, however, the Government shall order supplies (or services) hereunder having an aggregate value at the unit prices specified herein of not less than $100.00; and the Government shall be entitled to order and the Contractor shall be required to furnish supplies (or services) hereunder amounting to not more than the total estimated quantities set forth herein."

Plaintiff replies that the following excerpts from the Invitation and the Specifications show that a requirements contract was intended:

"SERVICES (Labor and Material) including paper stock as specified below and print weekly issues of the New York Naval Shipyard publication Shipworker as follows:

1. PRICE SCHEDULE A (Print in black ink)

To set type, proofread, make up, submit galley proofs and page proofs, and print in one color ink, fold, insert, and deliver: 50 Issues (about 750,000 copies)

• • •

"Minimum numbers of copies to be printed under this contract shall be 10,000 per issue, with the New York Naval Shipyard reserving the right to add increments of 1,000 up to a total of 30,000 copies per issue. The present requirement will be 15,000 copies per issue. Printing is to be in black ink unless other-

wise directed. During the 12 month term to this contract, [*sic*] it is expected that one to two issues will be printed in two colors. A six or eight page issue may be requested on occasion."

The two above-quoted clauses are directly contradictory; one or the other must fall. We think the indefinite-quantities clause must fall.

In the first place, it is a verbatim copy of a form used in many Government contracts. On the other hand, the clause on which plaintiff relies relates to this specific contract and to it only. The specific provision must prevail over the general.

The Government's draftsman picked up the wrong form. It is entirely inappropriate to what the parties sought to accomplish. The specific provision called for the printing of a minimum of 10,000 copies per issue for 50 issues. The contract was to last for 12 months, and the estimated contract price was $40,000. In contrast, the indefinite-quantities clause only bound the Government to take "supplies (or services)"[1] up to $100.00.

According to the Government's contention, when it paid for $100 worth of printing, its obligation was discharged. But, on the other hand, it acknowledges that the contractor was bound to keep his facilities available to print 10,000 copies a week of the newspaper whenever the Government might elect to order them. This would have prevented him from accepting any other business requiring the need of these facilities. It would have been a one-sided bargain, bordering upon a lack of mutuality under the facts of this case. The contract should not be given this construction if it can be avoided.

Defendant's purpose was to employ a printer to print its weekly newspaper over a 50-week period in quantity

[1] The form applied where supplies were contracted for or services were to be supplied.

sufficient to provide each employee of the Shipyard with a copy. That is why the contract provided for a fixed minimum quantity for each issue, but gave the contracting officer authority to order increments in units of 1,000 copies. The long term of the contract and the large contract price are also the reasons why the defendant required plaintiff to obtain a Certificate of Competency from the Small Business Administration before it would make the award to him. If it were able to shut plaintiff off after purchasing $100 worth of printing, defendant would not have gone to the trouble of assuring itself of his competency to perform the contract over its entire term. All signs indicate that both parties envisaged a relatively long-term relationship between them; nothing in the facts supports the idea that they intended that relationship to subsist only occasionally and at defendant's election.

In Tennessee Soap Co. v. United States, 126 F. Supp. 439, 130 Ct. Cl. 154 (1954), cited by defendant in support of its interpretation, there were no contradictory provisions in the contract, and the commercial setting was such that an indefinite-quantities contract made sense. In that case, it was clear at the time the contract was made that the Navy's need for soap was uncertain; though it obviously would need some soap over the course of the contract, the Navy had no idea just how much it would need or when it would want delivery to be made. In such a situation, the indefinite-quantities clause fits the situation; it enables the Government to procure needed supplies but does not commit it to buy too much or at the wrong time. In the case at bar, however, the minimum quantity of the Shipworker that would be needed and the times of its delivery were known to defendant in advance. Since the contractor was obligated to furnish this minimum number, the Navy, on the other hand, must be held to have been obligated to accept this minimum number.

Since this is a contract which required the Government to purchase its needs from plaintiff, it had no right to purchase them from another printer as long as the contract subsisted.

This is the view which the Armed Services Board of Contract Appeals took when plaintiff appealed the case to it. But the Board concluded that, although the refusal of the defendant to order from the plaintiff was unjustified, the effect of defendant's refusal was to terminate the contract for its own convenience under the Termination-for-Convenience-of-the-Government clause. Defendant urges us to accept this view and to remit plaintiff to his remedy under the termination procedure.

We are, however, unable to agree with the suggestion that there was in fact a termination for the convenience of the Government. At no time during the contract period did the contracting officer formally advise the contractor that the Government was terminating the contract for its convenience. The letter of the Commanding Officer of the Yard of October 4, 1960 (defendant's exhibit 2) said, "we are compelled to take steps to cancel our current contract with you for the printing of the Shipworker," but these steps were never taken.

The Armed Services Procurement Regulations (32 C. F. R. § 8.701) prescribe a mandatory termination-for-convenience clause which states that the contracting officer must, when terminating the contract for the Government's convenience, provide the contractor with a formal Notice of Termination and the manner in which the contractor can submit its termination claim, and sections 8.800-8.801 provide for form letters to be used to give Notice of Termination. None of this was done.

In the light of our recent decision in G. L. Christian & Associates v. United States, Ct. Cl., 312 F. 2d 418 (1963), the Armed Services Procurement Regulations have the force of law. These regulations were not complied with.

Indeed, the contracting officer never had any intention of cancelling the contract for the convenience of the Government, thereby subjecting the Government to liability; but rather because it asserted plaintiff's workmanship was faulty and not up to the standard required by the contract. On October 4, 1960, Rear Admiral S. N. Pyne, Commander of the New York Naval Shipyard, wrote to plaintiff complaining that the numbers of the newspaper that had theretofore been printed "have been reproduced in an unacceptable quality and appearance." The letter added that the poor quality of plaintiff's work had drawn complaints from the readers, and that in spite of plaintiff's promises to improve the quality of the printing, "Thus far whatever measures you have taken to eliminate these faults have been unsuccessful." The letter concluded:

> "For these reasons, and after nearly two months of continued substandard quality and complaints from our readers you did not correct the faults indicated to you. We can therefore no longer jeopardize the standing and readership of the Shipworker. Consequently we are compelled to take steps to cancel our current contract with you for the printing of the Shipworker."

Thereafter, the editor of the Shipworker gave plaintiff oral notice that he would not be allowed to print the October 28 issue, but he did not state the reasons therefor.

At no time prior to the Board of Contract Appeals' decision did any representative of defendant take the position that the contract was terminated for the convenience of the Government. Until then its position had been that under the indefinite-quantities clause its obligation was limited to ordering $100 worth of printing.

The defendant's contention would retroactively give a different legal effect to what was originally intended "by

changing the label which had been expressly and purposely attached to it when the termination occurred." Klein v. United States, 152 Ct. Cl. 8, 20, 285 F. 2d 778, 784-785 (1961). This we cannot do since " * * * [i]t would be anomalous indeed if the Government were entitled to breach its contract at will, and then escape the penalty for its breach by retroactively invoking a termination for convenience." Id. 152 Ct. Cl. at 18, 285 F. 2d at 783. Cf. Line Construction Co. v. United States, 109 Ct. Cl. 154, 190 (1947).

It seems clear to us that the sole ground upon which printing orders were withdrawn from plaintiff was that he had defaulted upon his obligation to print a newspaper of good quality and workmanship. If plaintiff had so defaulted he had breached the contract and it might have been formally terminated for plaintiff's default. In such case defendant would be justified in refusing to order the printing of any further issues from plaintiff and he would be entitled to no damages. If, on the other hand, plaintiff's work was of an aceptable quality, he was not in default and would be entitled to his damages and not merely a convenience-termination settlement.

This is, therefore, a breach of contract case, and the sole question is which party caused the breach. The Board of Contract Appeals made a finding to the effect that the Government was not justified in cancelling the contract on the ground of poor workmanship. Since this is a breach of contract case, the findings of the Board on this point are neither conclusive nor binding on this court, but one to be determined, in the first instance, by a commissioner of our court.

Accordingly, both defendant's motion and plaintiff's cross-motion for summary judgment are denied, and the case is remanded to a commissioner for further proceedings.

JONES, Chief Judge (dissenting in part):

I agree with the first part of the majority opinion that this was a requirements contract, subject to defendant's prescribed right of termination under either of the two provisions in the contract which conferred that right. Each of these provisions gives the defendant the specific right to terminate.

The first of these provisions is in part as follows:

> "22. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT
>
> "(*a*) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination * * *."

The second provision authorizing termination is set out in Article 11, which is in part as follows:

> "(*a*) The Government may, subject to the provisions of paragraph (*c*) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:
>
> "(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or
>
> "(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance

> of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure."

Paragraph (*c*) excuses the contractor for failure to perform for unforeseeable causes such as fires, floods, acts of God, etc.

After some other provisions, paragraph (*e*) of Article 11 is as follows:

> "(*e*) If, after notice of termination of this contract under the provisions of paragraph (*a*) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor or subcontractor pursuant to the provisions of paragraph (c) of this clause, such notice of default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. (*Except as otherwise provided in this contract, this paragraph (e) applies only if this contract contains such clause.*)"

These, then, are the only two provisions in the contract which give the defendant the right of terminating the contract.

The majority opinion takes the position that no notice of termination for convenience of the Government was given. Here we part company. There is no question that notice of cancellation was given. That right could only be exercised under one or both of the two listed articles.

In the letter of October 4, 1960, after making some complaint of the quality and appearance of the work, the letter ended with these words, "consequently we are compelled to take steps to cancel our contract with you for printing of the Shipworker." This was followed with a later oral statement that the contract would be cancelled and further information to the effect that the contract for the printing of the next issue would be let to a different contractor was conveyed to plaintiff. When the quoted provisions of the two letters in the record are given their natural interpretation, it becomes clear that they constituted notice that the defendant was exercising its privilege of terminating the contract under one or the other article of the contract which gave the defendant the privilege of termination. I have not the slightest doubt that both parties so understood it. This is especially true when the letters and oral notice were followed by defendant letting additional work to other parties. Plaintiff admits knowledge of this action.

No doubt in many instances termination is based on the fact that the defendant may not be pleased with the work of the contractor. It may terminate a contract for convenience of the Government with or without assigning a definite reason for doing so. It may terminate under Article 11 for any of the listed reasons. In the event the latter termination was unjustified, the defendant must account to the plaintiff on the same basis as if the termination had been under Article 22.

The majority concludes that because the notice was for cancellation rather than termination, proper notice of termination was not given. This we are persuaded to believe is a strained construction. According to both legal and standard dictionaries, one of the meanings of "cancellation" is "to terminate or end." Also, one of the meanings of "terminate" is "to end, cancel or stop." Thus, the fact that the word "cancel", rather than the word "terminate" was used is simply a play on words and a distinction without substantial difference. There may be a breach of the contract without cancellation or termina-

tion, e.g., a failure to comply with the terms of the contract, the interference by one party with the operations under the contract, unreasonable delays, and various other reasons. A cancellation may also constitute a breach.

On the other hand, cancellation necessarily means a termination. The two words are almost interchangeable. And yet because, forsooth, the word "cancellation" was used rather than "termination", the majority has undertaken to read out of the contract the reserved rights stipulated in the contract. Such a position will stand neither the light of reason nor the logic of analysis.

One article authorized termination simply when in the judgment of the contractor it was for the best interests of the Government. No specific reason was required. The other article provides for cancellation for either of two specific reasons, one of which includes the assigned reason given in the letter from the defendant to the plaintiff, dated October 4, 1960. Item 3, page 8 of the contract specifications states that the work "shall be of the best commercial quality and workmanship." Article 11 (*c*) states that if after the contract is terminated under paragraph (*a*) it is determined that the failure to perform is due to causes beyond the control or negligence of the contractor such default shall be deemed to have been issued pursuant to the clause entitled "Termination for Convenience of the Government", and the rights and obligations of the parties hereto shall in such event be governed by the termination clause if the contract contains such a clause.

The Board of Contract Appeals reached the conclusion that this act of cancellation should be treated as a termination for the convenience of the Government. We quote from the Board's opinion:

> "Thus we hold that when the Government without appropriate reasons stopped calling on [plaintiff] for the publication of the "Shipworker" and procured the services from other sources, it thereby effectively terminated the subject contract for its

own convenience. The rights and obligations of the parties under these circumstances should now be determined pursuant to the 'Termination for Convenience of the Government' article."

In College Point Boat Co. v. United States, 267 U. S. 12, 45 S. Ct. 199, 69 L. Ed. 490 (1925), the Supreme Court, through Mr. Justice Brandeis, stated in effect that the Government had an unconditional right to cancel the contract in suit even though the Government itself had clearly breached the contract and notwithstanding the plaintiff was already in that Court suing the Government for the breach. We quote from that opinion 267 U. S. at pages 15 and 16, 45 S. Ct. at pages 200-201, 69 L. Ed. 490 the following:

"The question remains whether the measure of damages recoverable for this breach is the same as it would have been if the Government had not possessed the right of cancellation. A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.[2] An unconditional

[2] Carpenter Steel Co. v. Norcross [6 Cir.], 204 Fed. 537, 539-540; Farmer v. First Trust Co. [7 Cir.], 246 Fed. 671, 673 [L.R.A. 1918C, 1027]; E. H. Taylor, Jr., & Sons v. Julius Levin Co. [8 Cir.], 274 Fed. 275, 282; Lubriko Co. v. Wyman [3 Cir.], 290 Fed. 12, 15; Boston Deep Sea Fishing & Ice Co. v. Ansell, L. R. 39 Ch. Div. 339, 352; In re London & Mediterranean Bank, Wright's Case, L. R. 7 Ch. App. 55; Baillie v. Kell, 4 Bing. N. C. 638, 650.[3]

[3] I quote the following from Farmer v. First Trust Co., supra: "Even if the cause assigned for dismissal was not in itself sufficient, if it appears that sufficient cause therefor did in fact exist, the dismissal was justified."

right to cancel can be availed of for the purpose of terminating a contract, even after suit brought unless some intervening change in the position of the other party renders that course inequitable. * * * Ignorance of its right doubtless prevented the Navy Department from taking, shortly after the Armistice, the course which would have resulted legally in cancelling the contract at that time. But the right to cancel was not lost by mere delay in exercising it; among other reasons, because the statute conferred upon the Government also the power to suspend the contract. The right remained effective as a limitation upon the Corporation's right to have the Government accept and pay for the mats. This continuing right of cancellation, which was asserted later, in court, operated to curtail the damages recoverable. It limited the value of the plaintiff's right to require performance, and hence the amount and character of the loss for which compensation must be made. Prospective profits were not recoverable."

It is true that the cancellation in the College Point Boat Co. case was permitted by a special statute then in force which covered the right to modify, suspend, or cancel a contract for the building, production, or purchase of ships or materials. However, in this particular case two provisions in the contract freely signed by both parties gave practically the same rights and are just as binding on the parties as was the statute involved in the College Point Boat Co. case.

In a similar case of Russell Motor Car Company v. United States, 261 U. S. 514, at page 523, 43 S. Ct. 428, at page 431, 67 L. Ed. 778 (1923), based on the statute, the Supreme Court stated:

"In cancelling the contract it was not necessary that the statute should be expressly referred to."

And on page 524 of 261 U. S., on page 431 of 43 S. Ct., 67 L. Ed. 778.

> "The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties. The lower court was right in refusing to allow anticipated profits and, there being nothing in the findings to justify the contrary, we must accept the amount fixed on the basis of just compensation as adequate."

It will be noted that the opinion states in effect that the statute then in effect became a part of the contract the same as if the provision had been written in the contract.

The case of Klein v. United States, 152 Ct. Cl. 8, 285 F. 2d 778 (1961), involved a number of different issues, including the False Claims Act, fraud and other issues, and is clearly distinguishable on the facts from the case at bar.

I agree with the Board that when the contract and the various letters with respect to its operation and suspension are considered together this should be treated as a termination for the convenience of the Government and that settlement should be had on the basis of the termination provisions of the contract.

The two provisions in the contract which give the right to terminate or cancel the contract should not be pitched out of the window merely on a choice of words and a distinction that for all practical purposes does not exist. Both parties knew exactly what was going on, both parties clearly understood the situation, both parties knew the contract was being ended, both parties knew the two provisions for termination, cancellation, or ending of the con-

tract were in the instrument which they had signed and the only ones contained in the contract instrument which gave any authority for cancelling of the contract.

These are important provisions. In a government that is far flung in its operations, with a vast number of employees, when that government must frequently struggle with the problem of insufficient available funds, where there is always the possibility of a change of policy or a slacking of need for the supplies in question, restrictive provisions are vital.

In a straight breach of contract suit the defendant might be saddled with a large judgment or with none at all, depending on the facts that may develop. The defendant rather than take this chance specially asked that this matter be treated as a termination under the terms of the contract. In all the circumstances and factual developments of this case I do not think the defendant should be denied its contractual right that the damages be thus restricted.

Apparently neither the contracting officer nor anyone representing him has made a determination of the amount, if any, due the plaintiff under the termination clause. So far as the record is concerned, no apparent effort was made by the contracting officer and the contractor to agree on this amount and the contracting officer did not determine the amount which should be paid to the plaintiff under the termination clause.

I would suspend action in this case for 30 days with a proviso that if the plaintiff or defendant desires to have this case referred back to the Board or to the contracting officer for the purpose of having this amount determined, either party may file such a motion during the interim period and it should be granted. If no motion were made during the specified time, I would refer the matter to one of the commissioners of this court for the purpose of hearing and determining the issue.

DAVIS, Judge (dissenting in part).

I stand with the court on two propositions: (a) this was a requirements contract, not an "indefinite quantities" contract; and (b) Klein v. United States, 152 Ct. Cl. 8, 285 F. 2d 778 (1961), requires us to hold that, if plaintiff's contract was wrongfully terminated for default, it cannot now be considered as having been terminated for the defendant's convenience. I depart from the court in believing that this contract was *not* terminated for default and that no issue of default is presented. The defendant does not argue that plaintiff was in default or that the contract was terminated under the default article. In cancelling the agreement, the contracting officer did not mention that clause; the references in Admiral Pyne's letter of October 4, 1960, to plaintiff's standard of work seem to me no more than an explanation of the reason why the defendant was exercising the privilege it thought it had of refusing to deal with plaintiff at any time and for any reason. The truth, to my mind, is that defendant's officials erroneously considered this an "indefinite qualities" contract and proceeded on that basis. They mistakenly thought the United States would incur no liability of any kind, no matter what the state of plaintiff's performance.

In the absence of a convenience-termination article, the defendant's abrupt cancellation when it still needed the printing would have been a breach entitling plaintiff to the full common-law measure of damages. The termination article, however, sets the limit to the possible recovery and precludes prospective profits. As the Chief Judge points out, the failure of the defendant to invoke that article makes no difference. This was not a termination for default and the rule of the Klein case is inapplicable. See John Reiner & Company v. United States, Ct. Cl., 325 F. 2d 438 and Brown & Son Electric Company v. United States, Ct.

Cl. 325 F. 2d 446.[4] It follows, in my view, that the measure of plaintiff's damages is what he would have received if there had been a convenience-termination.

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[4] In the course of showing that the defendant never invoked the termination-for-convenience article, the court points out that the contracting officer did not send a termination notice or follow the regulatory procedures for such a termination. Those facts are entirely relevant to deciding whether the default-determination *or* the convenience-termination mechanism was triggered by this contracting officer. The court decides, on the basis of these and other circumstances, that the default article was used in this instance and decides the case on that foundation. The failure to invoke the convenience-termination article and procedures would not matter, however, if the contract were cancelled, not for default, but because the defendant erroneously believed the agreement to be an "indefinite quantities" contract. See John Reiner & Company v. United States and Brown & Son Electric Company v. United States, supra.

IN THE

UNITED STATES COURT OF CLAIMS

No. 76-61

(Decided December 13, 1963)

BROWN & SON ELECTRIC COMPANY v. THE UNITED STATES.

Before JONES, Chief Judge, and WHITAKER, LARAMORE, DURFEE and DAVIS, Judges.

DAVIS, Judge.

Plaintiff charges the United States with breaking a valid contract by withdrawing the award and giving it to another bidder. In May 1960, the Air Force invited bids for the modification of a building at Robins Air Force Base in Georgia. The invitation called for proposals on certain electrical and construction work designated as the base work; in addition, bids were requested on a number of additive alternate items which were to "be awarded at the option of the Government contingent upon availability of funds". The invitation stated that the "award will be made on the lowest responsive Base Bid", but also required that bids be entered for both the base bid and all additive alternates. The bid bond requirement was as follows:

> "Bid guaranty in a penal sum of 20% (expressed in words & figures) of the bid price will be required in support of each bid if bid price is in excess of $2,000. (See par. 4 of attached SF 22, "Instructions to Bidders"). Failure to submit bid guaranty for receipt by the Government prior to the time fixed for opening of bids is cause for rejection of bid unless failure to do so was a result of delay in the mails for which bidder was not responsible".

When the bids were opened on June 15, 1960, these three bids were the lowest on the base work and those alternates the contracting officer included in the contract at that time:

Bidder	*Base Bid*	*Base Bid Plus Alternates*
Aaron Torch & Sons, Inc.	$341,584.	$376,334
Brown & Son Electric Co. (plaintiff)	378,277	412,501
Ga. Southern Const. Co.	380,000	408,634

Plaintiff's bid was accompanied by a bid bond "not to exceed Ninety Thousand & no/100 dollars ($90,000)". Torch's bid bond said "Twenty Percent (20%) of amount bid $68,316.80", and its bid form recited that enclosed was a bid bond "in the amount of 20% of the amount of bid". Georgia Southern's bid bond stated "Twenty Percent (20%) of amount bid".

Torch's bid was the lowest on both the base unit and the total contract work, but the contracting officer, pursuant to a legal opinion from the Base Judge Advocate, rejected that bid because the tendered bond was only for 20% of the base bid, not 20% of the total bid. The award was then made, on June 30, 1960, to plaintiff which was the second lowest bidder on the base work (though not on the contract as a whole). The formal contract was executed on July 14, 1960.

Immediately after the award, plaintiff began compliance with the requirement in the Notice of Award that it submit a schedule of materials and equipment within 30 days. To obtain the necessary information, plaintiff was compelled (it alleges) to place purchase orders and subcontracts amounting to $265,000 and to obligate itself for other substantial costs (all before July 14th). On July 15th, plaintiff was orally notified to suspend all work because Torch (as well as the Associated General Contractors of America) had protested to the Comptroller General that the award to plaintiff was improper. There followed a

written suspension order under the Suspension of Work Clause of the contract. Plaintiff, which had not known of the protests before July 15th, complied with these orders at once.

On September 15, 1960, the Comptroller General upheld the protest and ruled that the award to plaintiff was invalid and that it should go to Torch. On October 6th, the Air Force cancelled plaintiff's contract pursuant to this decision. Plaintiff filed appropriate protests and requested reimbursement by the Air Force. This was refused and the present suit was brought. Both parties have moved for summary judgment on the issue of liabiilty and there is no factual dispute on that aspect.

In Reiner & Company v. United States, Ct. Cl., 325 F. 2d 438, decided today, we treat with a similar case of cancellation of a contract following a General Accounting Office ruling that the award to the plaintiff was improper. In that opinion we discuss (a) the judicial standard for determining the legality of awards made by a contracting officer which are thereafter challenged as illegal, and (b) the measure of recovery for the unhappy contractor with a legal contract which is nevertheless cancelled in such circumstances. Those principles are fully applicable here and we deal with plaintiff's case in their light.

Despite defendant's strong urging, we cannot hold the award to plaintiff to have been so plainly a nullity that the whole contract should now be struck down as illegal. The argument for invalidity is twofold: (i) that in no event was plaintiff the lowest responsive bidder to the invitation as issued, and (ii) alternatively, that the invitation itself must be held invalid. Under the standard set forth in Reiner, we can agree with neither branch.

Torch was undoubtedly the lowest bidder, but the contracting officer rejected its bid because the bid bond was

only 20% of the base bid, not the full amount bid.[1] The invitation required a "bid guaranty in a penal sum of 20% (expressed in words & figures) *of the bid price*" (emphasis added). It was reasonable to read this as meaning the full amount bid, not merely the base bid. Both plaintiff and Georgia Southern so interpreted it; Torch itself admitted to the Comptroller General that it had intended to make its bond 20% of the full bid; it would be natural for the defendant to desire a bond computed on and covering all the work ultimately covered by the contract. Shortly after the opening, Torch claimed it had made a mistake and attempted to raise the amount of its bond, but, again, it was not unreasonable for the contracting officer to decide that the modification came too late. The invitation had specifically warned that the bid bond had to be received "prior to the time fixed for opening of bids". Only the year before, the Comptroller General had demanded strict enforcement of bid bond requirements (which he called "a material part of the invitation") in order, among other things, to prevent bidders from deciding after opening whether or not to try to have their bids rejected or accepted. 38 Comp. Gen. 532, 536-37 (1959); Comp. Gen. Dec. B-140624, Nov. 23, 1959. See also 39 Comp. Gen. 827, 829 (1960) (rejecting an award to a low bidder who inadvertently submitted a bond for 10% rather than 20%, of the bid); ASPR § 2.403, 32 C.F.R. § 2.403 (1960 Supp.). In his opinion on Torch's protest, the Comptroller General recognized himself that "strict rulings have recently been made with respect to the bid guaranty requirements expressed in the invitation", and he based his different conclusion here on what he called "the unusual circumstances in this case". The contracting officer was not unreasonable

[1] The sum of $68,316.30, set forth in Torch's bond, is 20% of $341,584, its base bid. Twenty percent of its full bid, $376,334, would be $75,266.80.

in thinking that no such exception should be made to the requirement that bids must conform to the invitation. We do not say that it was wrong or arbitrary for the Comptroller General to take the position he did. We do say that he was not plainly right as a matter of law, or the contracting officer plainly wrong.

Although Georgia Southern's total bid was lower than plaintiff's, its base bid was higher. The invitation said, in the plainest words, that the "award will be made on the lowest responsive Base Bid". The full contract price (including the additives) was not to be the standard. Once Torch's bid was rejected for non-compliance with the bid bond requirement, the contracting officer was required to grant the contract to plaintiff (with its lower base bid) if the terms of the invitation were to be followed. Under the invitation, plaintiff was the next lowest responsible and responsive bidder.

Defendant's alternative contention is that the invitation was invalid because it called for the award to be founded on the base bid alone. This is said to be contrary to the requirement of statute and regulation that awards be made to the lowest responsible bidder.[2] We note, first, that the Comptroller General does not appear to have considered the invitation unlawful. He directed that the award be made to Torch as the low bidder; if the invitation was illegal no award should have been made and the procurement re-advertised under a corrected invitation.[3] Here, too, there is room for dispute, but we believe the contracting officer to have acted reasonably in accord with the "lowest

[2] Price was the only variable factor in this procurement; performance time was fixed by the invitation.

[3] The basis of the Comptroller General's ruling is not entirely clear, but on the whole he seems to have treated the inclusion of the requirement that bids be measured by the base proposal as an error or mistake, rather than an illegality.

responsible bidder" requirement when he included this provision. Additives are portions of the work which may never be ordered because funds are not available. This procurement came toward the close of the fiscal year ending June 30, 1960. The invitation went out on May 16th and was to be opened on June 15th. The contracting officer knew on May 16th that he had money enough for the base work but he was uncertain as to the additives. Appropriated money is often very tight just before June 30th. He therefore confined the area of competition to the base bid because, as of May 16th, he and the bidders could only be sure of that much. Perhaps, the chances of including the additives were not large at that time; perhaps he was not sure how many of the five additives could or would ultimately be covered; or it may be that he knew that the additive bids (in themselves) were unlikely to vary very much. These were factors to be considered. True, the contracting officer might have indicated in the invitation that the award would be made on the base work if that was all to be ordered, and on the full contract price if money was found for the additives by June 15th; but this course might have excessively complicated the bidding if one, or some, rather than all, of the additives were finally chosen to be included.[4] We cannot say, on balance, that the contracting officer necessarily violated the "full and free competition" demanded by Congress in choosing as his guide the large core of the

[4] Defendant says that, under the type of invitation used here, bidders would tend to understate their base bids in order to get the contract, and at the same time increase their additive bids out of all measure. This danger exists to some extent, but it is mitigated by the fact that the bidder never knows whether or not the additives will be included; a bidder without this assurance is not likely to understate his base bid by much and therefore true competition will not be destroyed. Moreover, the contracting officer can always reserve the right to reject all bids and to re-let, if the additives turn out to sky-rocket the award.

procurement, the base work, which was almost 90% of the ultimate project. There was no plain illegality compelling this court so to declare and to deprive plaintiff of all recovery.

For these reasons, we hold, under one principle discussed in Reiner, that in the circumstances of this case plaintiff's contract should not be deemed void.

Under another principle of Reiner, we hold that plaintiff's recovery is not common-law damages (including unearned but anticipated profits) but the money to which it would be entitled on termination of the contract for the Government's convenience. (This contract contained such a clause.) Unlike the Reiner case, there is no agreement here as to what that sum would be. It might be argued that this determination should first be made within the Defense Department by the contracting officer and the Board of Contract Appeals. We do not follow that course, however. This is not a case in which the contract was actually terminated (or sought to be terminated) under the termination article. It is a case in which the agreement was cancelled for other reasons, now found to be wrong, but in which the doctrine of College Point Boat Corp. v. United States, 267 U. S. 12, 15-16, 45 S. Ct. 199, 200-201, 69 L. Ed. 490 (1925) (discussed in the Reiner opinion) "operate[s] to curtail the damages recoverable" when suit is brought for a breach. In such a case, there is no requirement of the contract or the Wunderlich Act, 41 U. S. C. §§ 321-322, that the damages be computed administratively; the termination article is invoked only as the limiting measure of recovery not as its source. The case comes to the court without any prior proceedings before the agency tribunals. Cf. Stein Bros. Mfg. Co. v. United States, Ct. Cl., No. 389-59, decided July 12, 1963, slip op. p. 5. A trial commissioner can take the necessary evidence and make the initial determination, following as nearly as he can the criteria of the termination article. Cf. G. L.

Christian and Associates v. United States, Ct. Cl., 312 F. 2d 418, 427.

Defendant's motion for summary judgment is denied, and plaintiff's motion for summary judgment is granted. Judgment is entered for plaintiff. The amount of recovery will be determined under Rule 38(c) in accordance with this opinion.

LARAMORE, Judge (concurring):

I concur for the reasons stated in my concurring opinion in Reiner & Co. v. United States, Ct. Cl., 325 F. 2d 438.

WHITAKER, Judge (concurring in part and dissenting in part):

I concur in that part of the opinion which holds that the contract was validly awarded to plaintiff in the first instance, and later was wrongfully cancelled. I dissent from the holding that the measure of damages is prescribed by the termination-for-convenience-of-the-Government clause, which was not invoked. My reasons are stated in my dissent in Reiner & Co. v. United States, Ct. Cl., 325 F. 2d 438.

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729-404—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 901

JOHN REINER & COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 1a–48a) is reported at 325 F. 2d 438.

JURISDICTION

The judgment of the Court of Claims was entered on December 13, 1963 (Pet. 48a). The petition for a writ of certiorari was filed on March 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the court below erred in holding that upon the government's cancellation of a valid contract for reasons which would have supported a termination for the convenience of the government, without, how-

ever, having invoked the termination-for-convenience clause in the contract, the contractor's recovery should be based upon the termination-for-convenience clause rather than upon principles applicable to a common law breach of contract.

STATEMENT

Petitioner brought this action in the Court of Claims to recover damages for an alleged breach of its contract with the government. The court held that, in the circumstances of this case, the cancellation of the contract by the government was not a common law breach of that contract, and that petitioner's recovery should be limited to the amount payable under the termination-for-convenience-of-the-government clause in the contract. The petition for certiorari raises solely the issue of the correctness of this holding.

In May, 1956 the Department of the Army advertised for bids on 3,567 generator sets. The invitation set forth a desired delivery schedule, but advised the bidder that if he could not make deliveries in accordance therewith, he should set forth his proposed schedule. It then stated that "[b]ids offering a proposed delivery schedule which will extend the time for delivery of the quantities as called for in any delivery period of the foregoing delivery schedule by more than 60 days, may be cause for rejection of bid" (Pet. 16a–17a).

Petitioner submitted a bid specifying delivery dates more than 60 days after the dates listed by the government in the invitation (Pet. 26a). When the bids

were opened, petitioner's was the lowest in price of 13 bidders. After the requisitioning agency determined that petitioner's proposed delivery schedule would meet its requirements, petitioner was notified by telephone on June 29, 1956, that its bid had been accepted. This was followed by written notice of award received on July 2, 1956, and a formal contract was executed shortly thereafter (Pet. 2a, 27a).

Petitioner then proceeded to negotiate with suppliers and to incur certain limited costs under the contract (Pet. 2a, 41a–42a). On August 3, 1956, petitioner was advised by the contracting officer to suspend all operations under the contract until further notice, and to inform its suppliers and subcontractors accordingly. This instruction was based upon a ruling made by the General Accounting Office, after a protest by an unsuccessful bidder, that the award was improper and the contract should be cancelled (Pet. 2a, 27a–28a). That Office had concluded that "the award as made does violence to the spirit and purpose of the law due to the fact that the bidders were not properly advised as to the basis upon which bids should have been submitted. Hence, the contract should be cancelled" (Pet. 32a–33a).

Unsuccessfully, petitioner sought a reversal of the Comptroller General's decision; and on September 21, 1956, the contracting officer advised petitioner that, in compliance with the ruling, its contract was cancelled (Pet. 33a). Petitioner replied that the decision of the Comptroller General was not binding upon the Army; that it considered the cancellation a

breach of the contract; and that it would seek recovery of full damages (Pet. 41a).

The contract clause entitled "Termination for Convenience of the Government" provided, *inter alia*, that "performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government" (Pet. 18a). The contracting officer did not invoke this clause in cancelling the contract.

The court below (one judge dissenting) held, first, that the award to petitioner must be deemed lawful, not void (Pet. 7a); and, second, that, in the circumstances of this case, the cancellation should be considered a termination for the convenience of the government with petitioner's recovery limited accordingly, upon the authority of this Court's decision in *College Point Boat Corp.* v. *United States*, 267 U.S. 12.

ARGUMENT

The decision of the court below, while not unimportant, is plainly correct. There being no conflict, further review by this Court is not warranted.

1. Central to the decision of the Court of Claims is the fact that this contract was cancelled for reasons which would clearly support a termination for convenience as being "in the best interests of the Government." The termination-for-convenience clause, in effect, confers a right to terminate at will, saving an exercise in bad faith or a clear abuse of discretion.

Petitioner's contention that the clause reaches only situations where the procurement is no longer necessary (Pet. 15–16) finds support neither in the language of the clause nor in judicial interpretation. While it is true, of course, that no contractual authority is needed to set aside an illegal contract, it does not follow, as petitioner maintains (Pet. 16), that the provision is inoperative when the affected agency disagrees with the Comptroller General's ruling of improper award. For, it obviously may be in the "best interests" of the government that the contracting officer avoid unseemly conflict and accommodate himself to the Comptroller General's opinion as a matter of policy.

2. The foregoing circumstances bring this case within the ambit of this Court's decision in *College Point Boat Corp.* v. *United States*, 267 U.S. 12. In *College Point Boat* the Navy, in effect, cancelled the contract by stopping the work and seeking a basis for settlement, without benefit of any right of termination reserved in the contract, and without knowledge that it had such authority under statute. There, as here, the department "failed to give the notice requisite to terminate the contract" (267 U.S. at 15). The stoppage of the work appeared to be an anticipatory breach; but the Court upheld the subsequent assertion of the right of termination and held that the contractor could recover only the limited damages afforded by the statute. Failure to invoke the provision at the time of termination was held unimportant (267 U.S. at 15–16):

> A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later. [Footnotes omitted.]

In the present case, no less than in *College Point Boat*, the "adequate cause" for termination existed in the broad termination-for-convenience clause; it could be asserted as a defense in petitioner's action for breach; and it "operated to curtail the damages recoverable" (*id.* at 16) to those authorized by the termination clause. Nor do the procedural irregularities dictate a different result. As the court below said: "Just as the failure to invoke the termination article leaves untouched the [government's] right to rely on the damage limitation of that clause, so the failure to follow the termination procedures of [procurement regulations] is ineffective to broaden [petitioner's] rights of recovery," since petitioner neither claimed, nor was there reason to believe, that it was injured by the informal procedures followed (Pet. 11a). Cf. *J. W. Bateson Co., Inc.* v. *United States*, 308 F. 2d 510, 514 (C.A. 5).

3. Petitioner's attempt (Pet. 6-9) to portray the present decision as in conflict with the court's earlier decision in *Klein* v. *United States*, 285 F. 2d 778, 152 Ct. Cl. 8, is unavailing. On the contrary, the opinion

below expressly reconciles the two cases (Pet. 10a–11a) and the distinction is emphasized by the decision of *Goldwasser* v. *United States*, 325 F. 2d 722 (Ct. Cl.) (Pet. 49a–65a), re-affirming the *Klein* holding, and *Brown & Son Electric Co.* v. *United States*, 325 F. 2d 446 (Ct. Cl.) (Pet. 66a–73a), re-affirming the instant case, on the same day.

Klein and *Goldwasser* merely announce the rule for cases in which the government erroneously cancels for asserted *default*. In that situation, the government is not permitted to terminate the contract retroactively for the "convenience of the Government." The instant case and *Brown & Son*, on the other hand, hold that the government is not barred from invoking the convenience clause when the contracting officer terminates the contract in deference to a ruling of illegality by the Comptroller General.[1] It seems clear the two rules are compatible. With one exception, the judges of the Court of Claims have unambiguously considered and rejected the contention that the decisions mentioned are in conflict. There is accordingly, no occasion for this Court to intervene.

[1] See Judge Whitaker's dissents in the instant case (Pet. 14a–15a) and in *Brown & Son* (Pet. 73a). Chief Judge Jones (Pet. 56a–63a) and Judge Davis (Pet. 64a–65a) dissented in *Goldwasser*, but on a differing view of the facts, and the latter expressly accepts the *Klein* rule (Pet. 64a).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1964

U. S. GOVERNMENT PRINTING OFFICE: 1964